APPENDIX.

JUDGE DILLON'S OPINION.

DILLON & HUBBARD.
Attorneys & Counsellors at Law.

NEW YORK, *June* 28, 1906.

N. W. HARRIS & COMPANY,
Pine Street, Corner William Street, New York City.

DEAR SIRS:—

You have requested our opinion upon the following question, namely, whether the franchise and rights of the Des Moines City Railway Company to maintain and operate its railways upon the streets of the city of Des Moines absolutely expired on the first day of January, 1898, or whether such franchise and rights still exist and continue, and if so, the nature and duration thereof.

The present railway company is the assignee and successor, among others, of the Des Moines Street Railway Company.

On the tenth day of December, 1866, the city council of the city of Des Moines passed an ordinance entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines" (Revised Ordinances of Des Moines, Compilation 1900, page 429). Section 1 of said ordinance is as follows:

> That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and conven-

> ient tracks for turn-outs, side tracks and switches, in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables, or car houses, and over the bridges and on such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner and for the time, and upon the conditions hereinafter mentioned and prescribed.

Section 2 provides that the cars to be used upon said tracks shall be operated with animal power only.

Sections 3 to 8, inclusive, relate to the purposes of the railway, manner of construction, etc., and do not otherwise materially bear upon the question submitted to us.

Section 9 provides as follows:

> This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the first day of January, A. D. 1872, unless the city council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and revert to the city of Des Moines. * * *

The ordinance contains no other provision for any forfeiture of the rights and privileges which it grants to the company.

Section 10 is important and is as follows:

> The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years from the time the first mile of said track

> is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

This ordinance required acceptance by the company, and the same was duly accepted, and under and in pursuance of said ordinance said company proceeded to construct, and within the time limited did construct, lines of railway along various streets of the city of Des Moines.

In three cases which are reported in 73 Iowa Reports, page 513, between the *Des Moines Street Railroad Company*, *the Des Moines Broad Gauge Street Railway Company*, and the *City of Des Moines*, the construction and effect of said ordinance of December 10, 1866, were considered and determined in 1887 by the Supreme Court of Iowa, in which cases the validity of the exclusive features in said ordinance of 1866 was the special subject of contest, and it was held and decided that the said ordinance was valid and that under it said Des Moines Street Railway Company, its successors and assigns, had an exclusive right to operate street railways on the streets of the city during said thirty years. The supreme court decreed in said cause, among other things, as follows:

> It is further ordered, adjudged and decreed that the plaintiff (the Des Moines Street Railroad Company) under the ordinance of 1866 (said ordinance of December 10, 1866), as subsequently ratified and adopted by the defendant the city of Des Moines, Iowa, is entitled to the exclusive privilege of constructing and operating lines of street railway by animal power upon the streets of the city of Des Moines for *expiration of the thirty years.*

The decree above quoted finds that the term of thirty years began to run from the first day of January, 1868. The said

term of thirty years would therefore expire on the first day of January, 1898.

It has recently been claimed on behalf of the city that *eo instanti* on the expiration of the thirty years, namely, January 1, 1898, all right of the company to maintain, use and operate its railways on the streets of the city *ipso facto* ceased, and that after that date such right no longer continued or existed or now exists. Whether such claim is well founded, or whether the company, after January 1, 1898, and at this time, has the right to maintain, use, and operate its railways upon the streets of the city is the question which is submitted for our opinion.

We have made a careful examination of the constitution and laws of the State and of said city ordinance of December 10, 1866, and the various ordinances of the city of Des Moines amending said ordinance of December 10, 1866, including certain consolidation resolutions, so called, passed September 5, 1889 (Rev. Ord. 1900, page 443), and the ordinance of March 8, 1890 (Rev. Ord. 1900, page 434), and including the authorized Revision of the Ordinances of the city of Des Moines of 1900. In this Revision of 1900 it was ordered by resolution of the city council that

> the period of thirty years from the first day of January, 1868, and that the plaintiff company has the right to extend its lines of street railway track and operate the same by animal power upon any streets of the city of Des Moines.

That decree is in full force and effect. It is therefore conclusively settled by this decision of the Supreme Court of Iowa that the contract created by the acceptance of said ordinance by the company and by the construction of its railway constituted a valid contract between the city and the company, and this ordinance on its face runs to "successors and assigns." *The only question, therefore, that is open is as to the rights of the company after the said ordinance of December 10, 1866, among others, be published as being*

in full force and effect, which was accordingly done, and this action of the city council was taken more than two years after it is now claimed or suggested that the ordinance and all rights of the company thereunder had fully expired on January 1, 1898. We have examined all the resolutions and ordinances of the city council passed at various times from December 10, 1866, down to the first of January, 1898, and from the last-mentioned date to the date immediately prior to the giving of this opinion, relating to extensions of the said road, assessments for paving, etc., etc. We have also examined the decisions of the Supreme Court of Iowa relating to this company in the cases of *Railway Company vs. Railway Company*, 74 Iowa, 585 (decided June 4, 1888); *Teachout vs. Railroad Company*, 75 Iowa, 722 (May 17, 1888); and *Des Moines City Railway Company vs. Des Moines*, 90 Iowa, 770 (May 12, 1894). The last-mentioned case refers to the ordinance of 1866 and the prior decisions of the Supreme Court of the State in the following language:

> The plaintiff (the present company, the Des Moines City Railway Company) is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions arising under that ordinance were considered by this court in *Des Moines Street Railway vs. Des Moines Broad Gauge Street Ry. Co.*, 73 Iowa, 515; *Id.*, 74 Iowa, 586. *It was held in these cases, in effect, that the ordinance and its acceptance constituted a valid contract between the city and the street railway company.*

UPON SUCH EXAMINATION AND AFTER FULL CONSIDERATION, IT IS OUR OPINION THAT THE TRUE MEANING AND EFFECT OF THE ORDINANCE OF DECEMBER 10, 1866, WAS TO GRANT TO THE ORIGINAL DES MOINES STREET RAILWAY COMPANY, ITS SUCCESSORS AND ASSIGNS, AN EXCLUSIVE RIGHT

AS AGAINST ANY RIVAL OR COMPETING COMPANY FOR THE TERM OF THIRTY YEARS, WHICH PERIOD EXPIRED ON THE FIRST DAY OF JANUARY, 1898, AND THAT AFTER THE FIRST DAY OF JANUARY, 1898, THE SAID ORDINANCE GRANTED TO THE COMPANY THE CONTINUING RIGHT, BUT NO LONGER EXCLUSIVE, WITHOUT LIMITATION AS TO TIME, "TO KEEP, MAINTAIN, USE, AND OPERATE" ITS RAILWAY UNDER AND PURSUANT TO THE SAID ORDINANCE OF DECEMBER 10, 1866, AND THE VARIOUS AMENDMENTS THERETO, AND THAT SAID RIGHT IS STILL IN FULL FORCE AND EFFECT, EXCEPT THAT BY VIRTUE OF THE CONSOLIDATION PROCEEDINGS HAD IN 1889 AND 1890, AND THE RESOLUTION OF THE CITY COUNCIL ADOPTED SEPTEMBER 5, 1889 (SEE REVISED ORDINANCES OF 1900, P. 443), AND THE ORDINANCE OF MARCH 8, 1890 (REV. ORD. 1900, P. 434), THE COMPANY IS EXPRESSLY AUTHORIZED UPON THE ROADS ORIGINALLY CONSTRUCTED AND UPON ROADS ACQUIRED, OR THAT IT MIGHT THEREAFTER CONSTRUCT OR ACQUIRE, TO OPERATE ITS CARS BY ANIMAL POWER OR BY ELECTRICITY OR OTHER PRACTICAL MOTOR POWER.

The grounds and reasons for this conclusion, that the company's rights to maintain and operate its railways in and upon the streets of the city of Des Moines is a still existing and continuing right, but not an exclusive right after the said thirty-year period, are briefly as follows:

FIRST. *The terms and purposes of the grant contained in the ordinance of December 10, 1866.*—The language of section 1, above quoted, purports to be a present grant, consent, permission and authority of the city council of Des Moines to the Des Moines Street Railway Company, its successors and assigns, to lay a single or double track for passenger railway lines "upon and along all the streets of the city of Des Moines, with their present and future extensions and connections," and upon certain alleys; and said section concludes in the following words:

> Authority is hereby given said company, their successors and assigns, to keep, maintain, use and oper-

ate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed.

Among the conditions is one contained in section 9 above quoted, that the company shall have a certain mileage fully completed and equipped and cars running thereon by the first day of January, 1869, and a certain additional mileage completed and equipped and cars running thereon by the first day of January, 1872.

This grant was made at a comparatively early period in the history of Des Moines, and at a time when there were no street railways in the city. The obvious purpose of the grant was to secure the construction of railways upon the streets of the city for the public accommodation at the earliest practicable time. To accomplish this end the city did not propose to use either its money or its credit. The ordinance was, as held by the Supreme Court (73 Iowa, pp. 521 *et seq.*), an invitation and inducement to private capital to embark in the enterprise of constructing and operating such a system of railways. AT THE TIME WHEN THIS GRANT WAS MADE IT WAS NOT THE GENERAL PRACTICE TO MAKE SUCH GRANTS WITH ANY TIME LIMIT, AND IT MAY CONFIDENTLY BE STATED THAT IN IOWA IT WAS NOT THE PRACTICE TO MAKE MUNICIPAL GRANTS OF THIS KIND FOR LIMITED PERIODS OF TIME. The pressing object was to secure such public accommodations by the investment of private capital, and the insertion of a time limit was not regarded as of controlling importance. In the ordinance in question the municipality considered that it secured the public rights by the provision in section 7 limiting the rate of fare, by requiring the early construction and operation of the road, by other provisions relating to the manner of construction and operation, and by limiting the exclusive rights of the company to a period of thirty years.

IT IS SETTLED LAW THAT A GRANT OF THIS KIND UNDER LEGISLATIVE AUTHORITY BY A MUNICIPAL CORPORATION TO A

PRIVATE COMPANY, WHERE THERE IS IN THE LAW OR ORDINANCE NO LIMIT AS TO TIME AND NO RESERVED RIGHT OF REPEAL OR REVOCATION, GIVES A RIGHT TO MAINTAIN AND OPERATE THE ROADS WHICH IS WITHOUT LIMITATION AS TO TIME. THERE ARE MANY CASES TO THIS EFFECT. WE REFER ONLY TO A FEW, FOR THE PRINCIPLE ABOVE STATED CANNOT BE DISPUTED. THUS, IN THE GREAT CASE OF *People against O'Brien*, 111 N. Y., PAGE 1, WHERE THE GRANT OF THE FRANCHISE TO CONSTRUCT AND OPERATE THE ROAD WAS NOT BY THE TERMS OF THE RESOLUTION OF THE CITY COUNCIL LIMITED OR REVOCABLE, IT WAS HELD THAT THE GRANT WAS IN FEE VESTING THE GRANTEE WITH AN INTEREST WITHOUT LIMIT AS TO TIME, AND THAT THE RIGHTS SO GRANTED MIGHT BE EXERCISED BY THE CORPORATION OR WHOSOEVER LAWFULLY SUCCEEDS TO THEM. SEE ALSO THE CASE OF *Detroit vs. Detroit Citizens' Street Railway Company*, 184 U. S., 368, 393, *et seq.*, DECIDED BY THE SUPREME COURT OF THE UNITED STATES IN 1901.

IN THE ORDINANCE OF DECEMBER 10, 1866, THERE IS NO LIMIT AS TO TIME AND NO POWER OF REVOCATION OR REPEAL. ON THE CONTRARY, IT REQUIRED ACCEPTANCE. IT WAS ACCEPTED, AND BECAME, AS HELD BY THE SUPREME COURT OF IOWA, A VALID AND BINDING CONTRACT BETWEEN THE COMPANY AND THE CITY. THEREFORE THE RIGHTS GRANTED BY THIS ORDINANCE TO THE ORIGINAL GRANTEE COMPANY ARE WITHOUT LIMIT AS TO TIME UNLESS SUCH LIMIT IS TO BE FOUND IN THE ORDINANCE MAKING THE GRANT.

The only claim, if any, that can be made that the right is limited in point of time is founded on section 10, above quoted, of the ordinance of December 10, 1866. The purpose of section 10 when its language is carefully examined will be seen to be not to limit or cut down the rights which had been granted by section 1 of the ordinance, but, on the contrary, the purpose was to grant something to the company which it would not have under the terms of the grant as contained in section 1; for while under section 1 the

grant would be unlimited in point of duration, it would not be an exclusive grant, and the city would be at liberty at any time, so far as section 1 is concerned, to grant a similar right to any other company, or itself to build a railway on the streets of the city in competition with the grantee.

SECTION 10 WAS INTENDED FOR THE BENEFIT OF THE COMPANY AND ITS PURPOSE WAS TO DISABLE THE CITY DURING THE TERM OF THIRTY YEARS FROM THE TIME THE FIRST MILE OF TRACK WAS LAID AND CARS RUNNING THEREON FROM MAKING A SIMILAR GRANT TO ANY OTHER COMPANY, AND PERHAPS TO DISABLE THE CITY DURING THAT PERIOD FROM ITSELF CONSTRUCTING OF ATTEMPTING TO CONSTRUCT A COMPETING MUNICIPAL RAILWAY ON ITS OWN ACCOUNT. THAT SUCH WAS THE PURPOSE AND THE ONLY PURPOSE OF SECTION 10 APPEARS NOT ONLY FROM THE EXPRESS LANGUAGE, THAT THE "RIGHT HEREIN GRANTED SHALL BE *exclusive* FOR SAID TERM OF THIRTY YEARS," BUT ALSO FROM THE FURTHER LANGUAGE OF SAID SECTION, THAT "THE SAID CITY SHALL NOT UNTIL *after* THE EXPIRATION OF SAID TERM GRANT TO OR CONFER UPON ANY PERSON OR CORPORATION ANY PRIVILEGES WHICH WILL IMPAIR OR DESTROY THE RIGHTS AND PRIVILEGES HEREIN GRANTED TO SAID COMPANY." ALL OF THE PROVISIONS OF SECTION 10 MUST HAVE EFFECT GIVEN TO THEM, AND THE LAST CLAUSE OF SAID SECTION 10 IS WHOLLY MEANINGLESS IF THE GRANT TO THE DES MOINES STREET RAILWAY COMPANY ABSOLUTELY EXPIRED AT THE END OF THIRTY YEARS FROM THE TIME THE FIRST MILE OF TRACK WAS LAID AND CARS RUNNING THEREON; FOR IT WOULD BE ABSURD TO SPEAK OF A GRANT TO ANY PERSON OR CORPORATION WHICH WOULD IMPAIR OR DESTROY THE RIGHTS GRANTED TO THE DES MOINES STREET RAILWAY *after* THE EXPIRATION OF THE THIRTY YEARS, IF BY REASON OF THE EXPIRATION OF THE THIRTY YEARS THE COMPANY HAD CEASED TO HAVE ANY RIGHTS WHATEVER.

It is true that section 1 of this ordinance of December 10, 1866, states that the right to maintain and operate the

railway is to be "for the time and upon the conditions hereinafter mentioned and prescribed," but this, taken in connection with section 10, means that the company is to have an *exclusive* right to operate the street railways for the term of thirty years, and after that the right, but no longer exclusive, to continue to maintain and operate the same. This view gives effect to every provision of section 1 and section 10, while the contrary view, that all rights absolutely terminated at the expiration of thirty years, is inconsistent with the purpose of section 10 as above explained, and wholly nullifies the last clause of said section. It was decided by the Supreme Court in the above-mentioned cases in 73 Iowa 513, that by the ordinance the company was under an implied obligation to hold itself in readiness at all times to construct and operate so much track and upon such streets as the public convenience might require. The company was therefore under this continuing obligation to extend its roads from time to time as the public convenience demanded, and in a growing city like Des Moines it would almost inevitably happen that extensions would be made during the entire period of the exclusive right, for which in the nature of things, if all rights of the company were to end absolutely at the expiration of the thirty years, the company could get no adequate return.

The term "exclusive right" simply means that the company has the right to exclude any other person or corporation from pursuing the same business; that is, the right to exclude competition, and it is a right conferred upon the company for its own benefit (*St. Louis vs. Gas Light Co.* 70 Mo., 69, 118). And this is all that the words in section 10, "that the right herein granted to said company (by section 1) to operate said railway shall be exclusive for the term of thirty years," means, namely, that the company should have the right to exclude competition for thirty years, and after that its right to exclude competition should no longer exist if the city should so determine. It did not

mean, and was not intended to mean, that all of the company's rights should *ipso facto* cease at the end of thirty years, but only its right longer to exclude competition. This was a club, so to speak, that the city retained to compel the company at the end of thirty years to deal fairly with it and the public, or the city might grant a competitive right to another company. It was not its purpose to drive the existing company out of the streets and destroy the value of its property, merely to grant similar rights to another company. This would destroy instead of securing competition. THIS CONSIDERATION OF ITSELF, EVEN WITHOUT THE CONCURRENCE AND SUPPORT OF THE LAST SENTENCE OF SECTION 10, DEMONSTRATES THAT IT MUST HAVE BEEN THE INTENTION IN SECTION 10 NOT TO CUT DOWN THE GRANT IN SECTION 1 TO THIRTY YEARS, BUT ONLY TO PROVIDE FOR COMPETITION IF THE CITY SHOULD SO DETERMINE AFTER THE EXPIRATION OF THE THIRTY YEARS.

If it had been the understanding of the city and the company that all the company's rights should *ipso facto* cease at the end of thirty years, the contract would naturally have so provided in express terms. Who was to own the rails and the cars at the end of the thirty years, the company or the city? The ordinance is silent on that subject. At the end of the thirty years, who was to serve the public by the use and operation of this road, which would be the only road in the city? On this the ordinance is silent. If the cars, rails and property belonged to the company, and there is no provision to the contrary, the company would have the right to remove them, and the city would be deprived of this public facility and left without any street railway whatever. It is not reasonable to suppose, if the understanding was that the company was to have no right whatever to maintain and operate its railways after the expiration of the thirty years, that the ordinance would have been silent on these vital and all important questions. On the contrary, if the true construction is, as we main-

tain, that after the thirty years there was a continuing, but not exclusive right in this company, the ordinance would have been left silent on these matters, just as it was. Nothing more was needed. The company at the end of the thirty years would of course own its rails, cars and property, and on the one hand would have the right, and on the other be under the duty, to maintain and operate its railways under and pursuant to the provisions of the ordinance just as much after the expiration of the thirty years as during that period.

We have been informed that said Des Moines ordinance of December 10, 1866, was modeled on an ordinance of the city of Indianapolis passed January 18, 1864, certain provisions of which are set forth in the case of *Citizens' Street Railway Co. vs. City Railway Co.*, 64 Fed. Rep. 647, (decided November 10, 1894). The language of sections 1 and 15 of said Indianapolis ordinance of January 18, 1864, are as follows, Id. 648:

> SECTION 1. Under and by virtue of an act of the General Assembly of the State of Indiana, entitled "An act to provide for the incorporation of street railroad companies," approved June 4, 1861, and by virtue of the powers and authority of the common council otherwise by law vested, consent, permission and authority are hereby given, granted and duly vested unto the company, organized with R. B. Catherwood as president a body politic and corporate, by the name of the "Citizens' Street Railway Company of Indianapolis," and their successors to lay a single or double track for passenger railway lines, with all the necessary and convenient tracks for turn-outs, side-tracks, and switches, in, upon and along the course of the streets and alleys of the city of Indianapolis, hereinafter mentioned; and to keep, maintain, use and operate thereon railway cars and carriages, in the manner, and for the time, and upon the conditions, hereinafter prescribed.
>
> SECTION 15. The right to operate said railway shall extend to the full time of thirty years from the pas-

> sage thereof; and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to, or confer upon any person or corporation any privilege which will impair or destroy the right and privileges herein granted to the said company.

In said section 15 of said Indianapolis ordinance the provision is "the right to operate said railway shall extend to the full term of thirty years from the passage hereof," etc., etc.

If it had been intended in the Des Moines ordinance that the right of the railway company to operate its road should extend only to the term of thirty years, how easy and natural it would have been to follow the language of said section 15. The language in section 10 of the Des Moines ordinance is that "the right herein granted to said company to operate said railway shall be exclusive for the term of thirty years," etc., etc., and in addition to the implication which this carries, that the right was to continue *after* the thirty years, come the express words that said city of Des Moines shall not until after the expiration of thirty years grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company. These words expressly recognize rights and privileges of said company "after the expiration of said term." Here, again, note the difference in language in section 15 from the Indianapolis ordinance above quoted: "and the said city of Indianapolis shall not during all the time to which the privileges hereby granted shall extend grant to or confer upon any person or corporation any privileges which shall impair or destroy the rights and privileges herein granted to the said company." In other words, the prohibition to confer any privileges upon any other person or corporation is one which exists during the term of thirty years. Nothing is said or implied in the language in section 15 of the Indianapolis ordinance as to the existence of any rights of the company

after the expiration of the thirty years' term, while in section 10 of the Des Moines ordinance it is implied that after the expiration of said term the company continues to have "rights and privileges."

Section 1 of said Indianapolis ordinance above quoted is substantially the same as section 1 of the Des Moines ordinance, "and to keep, use and operate thereon railway cars and carriages, in the manner, and for the time, and upon the conditions hereinafter prescribed." The words "for the time" in the first section of the Des Moines ordinance were obviously copied from the Indianapolis ordinance. In the case of the Des Moines ordinance these words "for the time" look forward so far as the exclusive right of the railway is concerned, to the provisions of section 10 of that ordinance, namely, that such exclusive right shall be for the term of thirty years; so far as the rights of the company after the thirty years are concerned, these are left where the rest of the ordinance leaves them notwithstanding the use of the words "for the time;" and the rest of the ordinance leaves the rights unlimited as to time.

In connection with this, it may be stated that an ordinance was passed by the town council of the town of North Des Moines May 9, 1885, which apparently was drafted either from this Des Moines ordinance of December 10, 1866, or from the said Indianapolis ordinance. The first section of said ordinance of 1885 uses the words "for the time and upon the conditions hereinafter mentioned and prescribed." See this ordinance—Des Moines Revised Ordinances 1900, page 460. We have looked through this ordinance of 1885, and do not find that the time for the maintenance and duration of the railway is thereafter mentioned or prescribed in said ordinance. If the same thing had been true in the Des Moines ordinance of December 10, 1866, clearly the use of the words "for the time" would not have prevented the right of the railway company from being a continuing right. No more ought the provisions of section 10 of said ordinance of 1866 (which were designed

to give the company the additional benefit of an exclusive right for thirty years and which implied a general right, not exclusive, to continue after thirty years) to be held, by reason of the existence of the words "for the time" in section 1 of said ordinance of 1866, to cut down the right of the company to thirty years.

SECOND. This conclusion, based upon the language, history, nature and purpose of the ordinance of December 10, 1866, as construed by the Supreme Court of Iowa, is supported by the *practical construction, without exception, which has been placed upon this ordinance from* 1866 *to the present time.* It is supported by fair inference, at least, in the decisions of the Supreme Court of Iowa above cited.

Some of the more material facts relating to the practical construction of this ordinance by the city and the company and the public are the following:

(1) The city solicitor of Des Moines, in the case of 73 Iowa, 513, to which the city was a party, filed a petition for a rehearing in the Supreme Court, IN WHICH IT WAS STATED THAT THE ORDINANCE OF 1866 GRANTED A *perpetual right* IN THE STREETS WHICH WAS EXCLUSIVE FOR THE TERM OF THIRTY YEARS, FOR WHICH REASON THE CITY CLAIMED THAT THE ORDINANCE WAS SO UNREASONABLE THAT IT WAS VOID. Said petition for rehearing states *inter alia*, as follows:

> It (the ordinance of 1866) gives to the plaintiff company the right in perpetuity to occupy all the streets and alleys with single or double tracks of street railway, and requires that they shall be operated by animal power only. There is no limit of time upon this right * * * the only limitation upon this grant is contained in section 10 in these words: "The rights herein granted to said company to operate said railway shall be exclusive for thirty years from the time the first mile of said track is laid and cars running thereon." This, we submit, only relates to the exclusiveness of the right and leaves the company

with its property interest and all the tracks single or double that it may have laid during this long term of years.

(2) In 1889 and 1890 question arose as to the consolidation of the street railway properties in Des Moines and their "electrification" and the investment of a large amount of money in these properties to effect this purpose. If this franchise of 1866 expired at the end of thirty years from the time the first rail was laid, to-wit, January 1, 1898, then the proposition before the people who were to advance this money, and before the city—which co-operated in these proceedings by passing the resolution of September 5, 1889 (Ordinances of 1900, page 443), and the ordinance of March 8, 1890 (*Id.*, page 434), was, that all this new and expensive work was to be done, new cars bought, electric power installed, a new power-house built, narrow-gauge lines made broad-gauge, and new rails laid, etc., etc., and all the money advanced for this purpose on the strength of a franchise which would continue for only eight years. It is obvious that neither the city authorities nor the owners of the railway properties, nor the persons who invested their money in the securities of the company, could have contemplated any such investment if the franchise had only eight years to run.

(3) We are informed that on January 1, 1898, on which date it has been suggested that the company's franchise under the act of 1866 expired, the company had 202,840 feet of track; that since January 1, 1898, 135,849 feet of this have been rebuilt, and that 199,478 feet of new track were laid after January 1, 1898, and prior to December 31, 1905; that on December 31, 1905, there were 76.49 miles of track, of which 12.78 miles were laid prior to January 1, 1898, and 63.71 miles were laid after January 1, 1898; and this work was done, not only without protest or objection on the part of the city, but in co-operation with the city, as is shown by what follows:

(4) Since January 1, 1898, the company has been assessed by the city for paving between the rails of its tracks at least $29,000. Two such assessments were made in 1905, and one made in 1906.

(5) The company is required * * * where it occupies a street paved prior to the track being laid upon it, to have the value of the paving assessed and to pay to the city treasurer the amount of such assessment. We are informed that since January 1, 1898, track of this kind has been laid of 26,923.3 feet, and the company has paid on account of such city assessments for paving approximately $10,000, and this $10,000 has been distributed pro rata among the owners of abutting property.

(6) Under an ordinance passed March 28, 1899, the company with the acquiescence of the city has equipped its cars with fenders, expending on that account approximately $4,500.

(7) Since January 1, 1898, the company has built a new fireproof power house, with new engines, boilers and generators, and also built new shops, and also spent a large amount on account of new equipment for use upon said railways.

(8) The last mortgage or trust deed of the company is dated April 1, 1901. Under this approximately $2,950,000 bonds have been issued. Since the date of this trust deed the proceeds of $1,715,000 of these bonds have been used for extensions, improvements and betterments of the plant of the company. Since January 1, 1889, we are informed that the net earnings of the company, after payment of the interest, have all been applied to the same purposes, and that the company has never paid any dividends.

(9) We referred above to the fact that the compilation of the ordinances of the city made by Mr. Baily and adopted

by resolution of the council of the city and published as the revised ordinances of 1900, contained this ordinance of December 10, 1866, *as being still in force*. (See Revised Ordinances 1900, pages 3 and 4.)

(10) Since January 1, 1898, a number of resolutions have been passed by the city council directing the laying of tracks by the company in various places where it was proposed to lay them either not in the center of the street or in some unusual way.

In these and in numerous other ways the practical construction which has been placed by all upon this ordinance since December 10, 1866; that is, by the city, by the railway company, and by the investors, and everything that has been done, is, that the right of the company was exclusive for thirty years, and after that a continuing right, but not exclusive. There is not so far as we have been advised or can learn one solitary instance of any action on the part of the city inconsistent with such view until the recent controversy was commenced.

WE HAVE SHOWN ABOVE THAT THE GRANT BY THE CITY TO THE COMPANY IS NOT AMBIGUOUS. BUT IF IT WERE, SUCH AN OPEN, PUBLIC, UNIFORM, UNVARYING, PRACTICAL CONSTRUCTION BY THE CITY AND THE COMPANY, EVIDENCED BY SO MANY ACTS REQUIRED OR ASSENTED TO BY THE CITY, ALL IMPLYING AND BASED UPON THE CONTINUED EXISTENCE OF THE ORDINANCE OF 1866 AFTER AS WELL AS BEFORE THE EXPIRATION OF THE THIRTY YEARS, AND THE DUTY AS WELL AS THE RIGHT OF THE COMPANY AFTER THE THIRTY YEARS TO EXTEND AND OPERATE ITS RAILWAYS—SUCH A PRACTICAL CONSTRUCTION, IF NOT AN ACTUAL ESTOPPEL ON THE CITY, IS, AT THE VERY LEAST, CONVINCING PROOF THAT THE REAL UNDERSTANDING AND PURPOSE OF THE PARTIES IN THE PASSAGE AND ACCEPTANCE OF THE ORDINANCE OF 1866 WAS THAT WHICH IS MANIFESTED AND SHOWN BY THIS UNEQUIVOCAL PRACTICE UNDER IT BOTH DURING THE THIRTY YEARS AND CONTINUOUSLY DOWN TO A VERY RECENT DATE. A MAP OF

THE COMPANY'S SYSTEM, IN WHICH IS DELINEATED THE ROADS OF THE COMPANY AS THEY EXISTED JANUARY 1, 1898, AND AS THEY EXIST TODAY, WILL SHOW THAT, AS ABOVE STATED, APPROXIMATELY FIVE-SIXTHS OF THE EXISTING RAILWAYS HAVE AT AN EXPENSE RUNNING INTO MILLIONS BEEN REBUILT OR NEWLY BUILT, MUCH OF IT AT THE REQUEST AND ALL WITH THE SANCTION OF THE CITY SINCE JANUARY 1, 1898; THAT IS, AT A TIME WHEN IT IS NOW SUGGESTED THAT THE COMPANY'S RIGHTS HAD WHOLLY EXPIRED. WE THINK NO COURT OUGHT TO SUSTAIN SUCH AN UNJUST PRETENSION.

FOR THESE REASONS WE ARE OF THE OPINION THAT ONLY THE COMPANY'S EXCLUSIVE RIGHT ENDED ON JANUARY 1, 1898, AND WE ARE FURTHER OF OPINION THAT THE COMPANY HAS THE CONTINUING RIGHT TO MAINTAIN AND OPERATE ITS RAILWAYS ON THE STREETS OF THE CITY, AS IT IS NOW DOING, AND THAT ITS RIGHTS IN THIS RESPECT ARE VESTED, CONTRACT AND PROPERTY RIGHTS, WHICH WILL CONTINUE AS LONG AS THE COMPANY PERFORMS THE DUTIES REQUIRED OF IT BY LAW, AND WHICH CANNOT BE TERMINATED OR IMPAIRED BY THE CITY, OR EVEN THE LEGISLATURE, WITHOUT THE CONSENT OF THE COMPANY.

Very truly yours,

JOHN F. DILLON.
DILLON & HUBBARD.

Brief and Argument for Appellant

Supreme Court of the United States

OCTOBER TERM, 1908

No. 171

CITY OF DES MOINES, APPELLANT

vs.

DES MOINES CITY RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

WM. H. BAILY,
HOWARD J. CLARK,
WM. H. BREMNER,
R. O. BRENNAN,
Attorneys and Counsellors for Appellant.

(20840)

Brief and Argument for Appellant.

STATEMENT.

On the 21st day of November, 1905, the City Council of the City of Des Moines passed a resolution in words and figures as follows, to-wit:

"Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Inter Urban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines; and,

"Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible,

"Be it Resolved by the City Council of the City of Des Moines: That said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five (25) days after the passage of this resolution.

"Be It Further Resolved: That should the said railway companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be It Further Resolved: That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

(Record, page 15.)

Thereafter, and on the 24th day of November, 1905, a copy of said resolution was served upon the Des Moines City Railway Company.

(Record, page 15.)

Thereafter, and on the 27th day of November, 1905, the complainant, Des Moines City Railway Company, exhibited its bill in the Circuit Court of the United States, Southern District of Iowa, Central Division, claiming that it is a corporation organized and existing by virtue of the laws of the State of Iowa, with its principal place of business in the City of Des Moines, for the purpose of carrying on a rail-

way and street railway business; and that the respondent, the City of Des Moines, is a city of the first class, organized under the general laws of the State of Iowa relative to municipal corporations.

That on the 10th day of December, 1866, the respondent enacted an ordinance entitled, "An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," the material part of which ordinance is as follows:

"Section 1. That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables or car-houses, and over the bridges and on such streets in the City of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, *and for the time*, and upon the conditions hereinafter mentioned and prescribed.

"Section 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

"Section 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit: (there being eleven rules and regulations specifically set out.)

"Section 14. Within thirty days from the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted, this ordinance shall operate as a contract between the City and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever."

That the complainant, within the time provided, filed its written acceptance of the ordinance with the proper authorities.

That the grantee in said ordinance complied with the terms thereof, and at all times, in reliance upon the terms and conditions of the con-

tract, evidenced by said ordinance, expended large sums of money in the construction, maintenance and operation of its lines of street railway in the streets of the respondent.

That afterwards, and on the 1st day of July, 1886, the Des Moines Street Railway Company, grantee, sold and transferred to the Des Moines Street Railroad Company all of its property, including the rights, privileges and franchises granted by the ordinance of December 10, 1866. That thereafter, certain controversies arose between the Des Moines Street Railroad Company and the City of Des Moines, wherein it was decided by the Supreme Court of Iowa, (73 Iowa, page 513; 74 Iowa, page 585), that the Des Moines Street Railroad Company, as assignee, had the exclusive right to maintain and operate a street railroad over the streets, alleys and public places of the City of Des Moines for thirty (30) years from the 10th day of December, 1866.

That on the 9th day of November, 1883, the respondent passed an ordinance authorizing the construction and operation of street railroads in South Des Moines, such permission and authority being given to the Des Moines & Sevastopol Railway Company, its successors and assigns, which ordinance was accepted by the grantee.

That on the 20th day of December, 1887, the respondent passed an ordinance, granting to the Des Moines Broad Guage Street Railway Company, its successors or assigns, authority to maintain and operate, by electricity or other motive power, other than animal or steam power, a street railroad on any street, single or double track, standard or broad guage street railway tracks.

That numerous controversies had arisen between the various street railway companies owning franchises in the City of Des Moines and the respondent, relative to the rights of said companies under the grants referred to. That negotiations were entered into for the consolidation of all of the street railway companies in the City of Des Moines, subject to the consent and approval of the respondent, which consent and approval were given by the respondent and accepted by the complainant.

That thereafter and on the 8th day of March, 1890, the respondent enacted an ordinance amending the ordinance of December 10, 1866,

and providing that the cars to be used upon the railway tracks constructed under and pursuant to the ordinance "or acquired by said company or its assigns, or that hereafter may be constructed or acquired, shall be operated by animal power or by electricity or other practical motor power;" and also providing that the rates of fare on any line or road of said company's railway shall not exceed five (5) cents, and otherwise modifying the rules governing the operation of such railways. That such ordinance was accepted by the Des Moines Street Railroad Company.

That at the time of the adoption of this ordinance, the City of Des Moines had the "power to authorize or forbid the construction of street railways within their limits, and may define the motive power by which the cars thereon shall be propelled."

That on the 20th day of June, 1886, the respondent adopted an ordinance, authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railways in the City of Des Moines, and defining the powers and duties of said company, which said ordinance was accepted by the grantee.

That on or about the 16th day of May, 1888, the respondent granted to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railways along and upon certain streets in the city.

That on the 20th day of September, 1888, the respondent granted to the Des Moines River Line Street Railway Company the right to construct and operate a street railway in certain streets of the city.

That on the 14th day of May, 1888, the City of Des Moines granted to the Des Moines Rapid Transit Company, the right to construct, maintain and operate its railway along and upon certain streets in the City of Des Moines, and on the 21st day of August, 1888, enacted a further ordinance, purporting to grant to the Des Moines Rapid Transit Company certain rights to operate street railways in the City of Des Moines, which ordinance was duly accepted.

That all of the franchises heretofore referred to were assigned to the Des Moines Suburban Railway Company, and by that company and the Des Moines Street Railroad Company, assigned to the complainant, the Des Moines City Railway Company, and that the com-

plainant has ever since been the owner of said rights, privileges and franchises, and is and ever since that time has been engaged in maintaining and operating a system of street railways in the streets of the City of Des Moines.

That the City of Des Moines has recognized the complainant as assignee and holder of the rights, privileges and franchises referred to, and assented without objection or protest to the exercise of such rights, privileges and franchises by the complainant. That the ordinance of December 10, 1866, as amended, constitutes a contract between the complainant and the respondent, whereby there is vested in the complainant, the right, subject only to the restrictions and conditions specified in said ordinance, and unlimited as to time, to construct maintain and operate an electric street railway system in the streets and alleys and over the bridges of the City of Des Moines, which right was exclusive for the term of thirty (30) years from and after the 1st day of January, 1868.

"Par. 30. That the expenditures of your orator in acquiring said street railway system and the various other franchises, rights and privileges granted by said city of Des Moines and acquired by your orator, as hereinbefore set out, and its expenditures thereafter made in re-building, extending and maintaining said street railway system, and the equipment therefor, and the appurtenances thereto, were all made by your orator in reliance upon the sanctity of the said contract evidenced by the said ordinance of December 10, 1866, as amended, and the acceptances thereof."

"Par. 31. That the said City of Des Moines has, by a long series of acts and enactments during a long series of years, uniformly treated the said ordinance as a contract as above set out, and has by the enactment of many ordinances and resolutions since the year 1890, uniformly recognized the said ordinance of December 10th, 1866, as a contract, and interpreted it as hereinbefore set o

That in reliance upon the ordinance of December 10, 1866, as constituting a contract, the complainant has expended large sums of money in the equipment, maintenance and operation of its railway system. That in addition to the construction, maintenance and operation of said railway system, the City, from time to time, required and com-

pelled the complainant to make changes in its lines of street railway and extensions thereof, and lay and re-lay and pay the cost of paving upon streets upon which its lines were located, amounting to many thousands of dollars. That the complainant is about to enter upon certain streets within said city for the purpose of laying its tracks thereon in accordance with the terms and provisions of the ordinances hereinbefore set out, and that the construction of said proposed extension is necessary for the successful operation of a street railway system, and in order to furnish to the public in said city, adequate street railway facilities. That the respondent intends to and is about to interfere with complainant's right under the contract, and threatens to and will, unless restrained by the orders of court, interfere therewith, and with the rights of complainant to maintain and operate its tracks already constructed in the streets of the City, and to that end and for that purpose, the City Council did, on or about the 20th day of November, 1905, pass the resolution heretofore referred to, and caused a copy of the same to be served on the complainant.

That the respondent denied the complainant's right, under the contract and ordinances above set out, to build additional lines and to maintain or operate its lines already constructed, and is about to and will interfere with and attempt to prevent complainant from building any such lines or extensions, and will interfere with and attempt to prevent complainant from maintaining the lines already constructed and now owned and operated by it, unless enjoined from so doing by the court. That it is the intention of the respondent to claim and enforce a forfeiture of the complainant's rights and privileges under said ordinances and contract referred to herein, and that so to do would result in immediate, great and irreparable injury to the complainant. That in order to construct and equip its railway system, the complainant has been compelled to borrow large sums of money, and that as evidence of such indebtedness, there have been issued and are now outstanding bonds in a large amount, which sums are secured by a trust deed upon the property of the complainant. That for respondent to interfere with the complainant's exercise of its rights under the contract and ordinances by removing its tracks, or taking steps looking to their removal, or by interfering with its continued operation, or by preventing the making of necessary extensions, the respondent will slander

and discredit complainant's title to the franchises and property, and impair its credit and embarrass its future operations.

That the complainant has a vested property right under and by virtue of the ordinance of December 10, 1866, as amended, as well as under the other ordinances hereinbefore referred to; and that to forfeit such rights or to dispossess the complainant of the same, or to interfere with its exercise and enjoyment of them, will cause great, direct, immediate and irreparable injury to such vested rights and to the complainant. That the adoption of the resolution by the respondent on the 21st day of November, 1905, as heretofore referred to, and any enforcement of the terms and provisions thereof, are in violation of the Constitution of the United States, and particularly of Section 10 of Article I thereof, and of Article XIV of the amendments thereto, in that they impair the obligations of complainant's contracts with the respondent, and if enforced against complainant, will take its property and property rights without due process of law. That the complainant has no plain, speedy and adequate remedy at law, and that unless it can have relief in equity, it is remediless. That this suit is in equity, of a civil nature, and that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of Five Thousand Dollars ($5,000.00).

That this cause is a suit arising under the Constitution of the United States in this: that the complainant seeks relief against the respondent by reason of an attempt on the part of the respondent to enforce against the complainant the resolution of the City Council of the City of Des Moines heretofore set out. That the resolution and the action contemplated thereunder impairs and is in violation of the obligation of the contracts between the complainant and the respondent, and if enforced, would take complainant's property without due process of law and deny to it the equal protection of the law in violation and in contravention of the provisions of the Constitution of the United States, and especially in violation of Section 1 of Article XIV of the amendments to the Constitution of the United States, and of Section 10 of Article I of the Constitution of the United States.

The complainant prayed that it might have the relief to which it is justly entitled in the premises, and that the respondent, the City of Des Moines, its City Council, officers, agents, servants and representatives, and each one of them, be perpetually enjoined and restrained

by the order and decree of this court from proceeding further in the premises, and from in any way interfering with the complainant's rights under said contracts, ordinances and enactments, and that the resolution of the City Council of the respondent, enacted November 21, 1905, requiring the removal of complainant's tracks, etc., be decreed to be void, and that the said City of Des Moines, its City Council, officers, agents, servants and representatives, including its City Solicitor, be perpetually enjoined from proceeding thereunder to enforce the same, and from in any manner obstructing or interfering with complainant's free use and comfortable enjoyment of its property, rights, franchises and privileges, and that the complainant have a temporary injunction pending the final disposition of this suit.

(Record, page 1 to 22, both inclusive.)

That thereafter, and on the 1st day of January, 1906, the respondent filed its answer to the bill of complaint, wherein it alleged that it admitted that the complainant, Des Moines City Railway Company, is a corporation, organized and existing by virtue of the laws of the State of Iowa; that it was organized on the 24th day of July, 1893, for the purpose of carrying on a railway and street railway business, the general nature of which was stated in Paragraph 1 of complainant's complaint.

That the City of Des Moines is a city of the first class, organized under the general laws of the State of Iowa, having all of the powers vested by such laws in such municipal corporations.

That on the 10th day of December, 1866, the City of Des Moines duly enacted an ordinance authorizing the construction and operation of a certain street railroad in and along the streets of the City of Des Moines, Iowa, a copy of which is attached to complainant's bill as Exhibit "A." That it admits the allegations set forth in Paragraphs 4, 5 and 6 of the bill of complaint, and that it has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7; therefore, denies the same.

That the Des Moines Street Railroad Company is a street railway corporation, created and existing by virtue of the laws of the State of Iowa, and that it purchased from the Des Moines Street Railway Company all of its street railway property, including all of its tracks and

equipments used in the operation of the same, about the 1st day of July, 1886; but denies that the Des Moines Street Railroad Company purchased the rights, privileges and franchises granted by the ordinance of December 10, 1866, as amended, but it admits that it attempted to do so.

That it admits that controversies arose between the Des Moines Street Railroad Company and the respondent and between the Des Moines Street Railway Company and other companies, to which the City of Des Moines had granted certain street railway privileges, which controversies resulted in litigation between the Des Moines Street Railroad Company and the City and other companies; but denies that the Supreme Court of Iowa decided that the ordinance of December 10, 1866, as amended, constituted and was a valid, enforceable contract between the said Des Moines Street Railroad Company and the City of Des Moines, but avers that in the case referred to in paragraph 9 of the Bill of Complaint, no question was raised as to whether said ordinance constituted a valid, enforceable contract in the hands of the Des Moines Street Railroad Company.

That it admits the allegations contained in Paragraphs 10, 11, 12, 13 and 14 of the bill of complaint, and that on the 8th day of March, 1890, the City of Des Moines further amended said ordinance of December 10, 1866, substantially as set forth in Paragraph 15 of the bill of complaint, and that such ordinance was accepted by the Des Moines Street Railroad Company; and further admits that the provisions of Chapter 11, Acts of the Twenty-third General Assembly of the State of Iowa, were substantially as claimed in paragraph 15 of the Bill of Complaint, but denied that the ordinance of 1890 was re-enacted in 1874, but avers that the revision adopted in said year was simply a collection of the ordinances then believed to be in force; denies that on the 6th day of October, 1879, the City re-enacted the ordinance of 1866, but admits the allegations contained in Paragraphs 19, 20, 21, 22, 23, and 24 of the Bill of Complaint, but denies the allegations contained in Paragraph 25 of the Bill of Complaint.

The respondent admits that on or about the 25th day of August, 1893, an attempt was made by the Des Moines Street Railroad Company and other companies operating street railways in the City of Des Moines, to transfer and assign to the Des Moines City Railway Com-

pany, the complainant, all of their street railways and properties in the City of Des Moines, and in the towns adjacent thereto, together with all the rights, privileges and franchises granted by the City of Des Moines and by the municipalities subsequently incorporated therein under the various ordinances referred to in the Bill of Complaint, but that the respondent believes that the Des Moines Street Railroad Company and other companies had no power or right to transfer to the complainant herein the rights, privileges and franchises owned and enjoyed by the Des Moines Street Railroad Company, and other companies; but admits that ever since the 21st day of August, 1893, the complainant has been engaged in maintaining and operating a system of street railways in the streets of the City of Des Moines. Respondent denies that it has recognized the complainant as the assignee and holder of all of the rights, privileges and franchises heretofore referred to, or that it has assented, without objection or protest, to the exercise of the said rights, privileges and franchises.

That as to the allegations in Paragraph 28 of the Bill of Complaint, respondent states that in the case of *Des Moines City Railway Company vs. City of Des Moines*, 90 Iowa, 770, no question was raised as to the ownership of the rights, privileges and franchises granted by the ordinance of 1866 as amended; denies that the ordinance of December 10, 1866, as amended, constitutes and is a contract between the complainant and the respondent, unlimited as to time, and that, by said ordinance, there was vested in the complainant the right to construct, maintain and operate an electric street railway system in the streets and alleys and over bridges of the City of Des Moines, but states that said ordinance granted the right to construct, maintain and operate a street railway system in the streets and alleys and over the bridges of the City of Des Moines for a limited length of time, to-wit: thirty (30) years, and that all of the rights, privileges and franchises obtained under said ordinance expired by limitation, and by the terms of the ordinance, on or about the 1st day of January, 1898; denies the allegations contained in Paragraph 30 of the Bill of Complaint, and states that as to whether or not said allegations are true is immaterial, as in event of their truth, the life of the rights and privileges granted by the ordinance of December 10, 1866, could not thereby be prolonged.

Respondent denies the allegations contained in Paragraph 31; ad-

mits that many thousands of dollars have been expended in the construction, maintenance, equipment and operation of a street railway system and power plant in the City of Des Moines, and that the complainant is now operating about seventy (70) miles of street railway in the city; admits that extensions have been made with the knowledge of said city, but without its acquiescence therein; denies that the respondent has from time to time required or compelled the complainant to make changes in its street railway or to make extensions thereof, or to lay or re-lay any of its tracks, but admits that it has been required to pay portions of the cost of pavement upon streets upon which its lines were located; admits that the complainant and its grantors have always claimed the right to build, extend and operate its street railways upon the streets of said City of Des Moines, but denies that such claim has ever been admitted by the respondent; admits that in order to successfully operate and maintain its street railway system and furnish adequate street railway facilities to the residents of the City of Des Moines, it will be necessary for the complainant, from time to time to extend its present system, but denies that such extension will be made or can be made pursuant to any contract now existing between the complainant and the respondent, and denies that any contract now exists between the complainant and respondent, under and by virtue of which the said complainant is authorized to maintain and operate its present railway system, or to make extensions thereof; that it has no knowledge nor information that the complainant is about to enter upon certain streets of the City of Des Moines for the purpose of laying its tracks thereon.

"Par. 26. That it denies that the City of Des Moines intends to or is about to interfere with any rights of the plaintiff herein, or that it threatens to interfere with any rights which the plaintiff now has. That it admits that on or about the 21st day of November, 1905, the City Council of the City of Des Moines passed the resolution heretofore referred to, and that on or about the 24th day of November, 1905, it caused a copy of such resolution to be furnished to the complainant.

"Par. 27. That this defendant denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff herein unless it shall be declared by some court of competent jurisdiction that the plaintiff has

no right to maintain or operate said system. That it was the intention of the City of Des Moines, in the passage of the resolution heretofore referred to, to simply lay a foundation for the commencement of an action for the purpose of testing the rights of the plaintiff to so maintain and operate its said railway system, and further states that it is the intention of said city to commence an action in equity in the District Court of the State of Iowa, in and for Polk County, it being a court of competent jurisdiction, for the purpose of testing such rights, and that the City of Des Moines has no intention to do otherwise than this, and does not now threaten or never has threatened to interfere with the plaintiff by force, or to attempt to take away or forfeit any rights, privileges or franchises which the plaintiff herein claims to have, except under and by due process of law.

"Par 28. That it is not now and never has been the intention of the City of Des Moines to take or attempt to take from the plaintiff herein any rights which it may have under and by virtue of the ordinances referred to in the bill of complaint, but that the City of Des Moines is simply seeking to have the rights of the plaintiff fully determined by a court of competent jurisdiction to the end that the plaintiff herein may not exercise rights and privileges of which it is not the possessor. That the City of Des Moines is simply seeking to protect and preserve its own rights and the rights of the public by resorting to a court of competent jurisdiction.

"Par. 29. That it admits that the plaintiff herein is engaged in the carrying of United States mail as set forth in the bill of complaint, but denies that such fact can extend, increase or change the rights and privileges of the plaintiff herein to maintain and operate a street railway system, in, upon and along the streets of the City of Des Moines; denies that it is the intention of the City of Des Moines to interfere directly or indirectly with the carrying of such mail; denies that it is the intention of the City of Des Moines to tear up the tracks of the plaintiff.

"Par. 30. That it denies that the plaintiff has a vested property right either by virtue of the said ordinance of December 10, 1866, as amended, or the other ordinances referred to in the bill of complaint.

"Par. 31. That it denies that the adoption of the resolution above

referred to passed on or about the 21st day of November, 1905, and the enforcement of the terms and provisions thereof, are in violation of the Constitution of the United States or of Section 10 of Article 1 thereof, or of Article 14 of the amendments thereto, or that the said resolution or the enforcement thereof will impair the obligation of any contracts which the plaintiff may have with the City of Des Moines, or will cause the taking of the plaintiff's property or property rights without due process of law, but on the contrary, it is the purpose and intent of such resolution that unless the plaintiff shall voluntarily and of its own accord cease the maintenance and operation of its railway system, that then the City of Des Moines will proceed by due process of law to ascertain what rights the plaintiff herein has under and by virtue of the ordinances hereinbefore referred to, and that the City of Des Moines has not now and never has had any intention to do otherwise.

"Par. 32. This defendant further states, that this is a controversy between two citizens of the State of Iowa; that no Federal question is involved, and that this court is without jurisdiction to hear the same.

"WHEREFORE, because of the facts hereinbefore set forth and because this defendant has no intention to do the things complained of in the bill of complaint, and because this defendant is proceeding in all respects in accordance with its rights, and is not interfering or attempting to and never has it threatened to take from the plaintiff any property or property rights without due process of law, this defendant prays that the temporary restraining order heretofore issued in this cause be dissolved, and that the bill of the complainant be dismissed, and that it be allowed to go hence with its costs." (Record, pages 23 to 28, both inclusive.)

That thereafter and on the 3rd day of December, 1906, the respondent, by leave of court first had and obtained, filed an amendment to its answer as follows:

"That in and by the ordinances mentioned in paragraph 3 of the bill, it is agreed that the grantee company, its successors and assigns, shall annually file with the city treasurer a sworn statement or report of the net earnings of said street railway for the year last past, and that in others of the ordinances of the city and suburban towns mentioned in the bill, like agreements are made. That the said agreements are an important part of the consideration for the grants under which complainant has or claims to have the franchises and right to maintain and operate its said system of street railways, and are an important part of the conditions upon which said grants were made.

That the said agreements are obligatory upon complainant as assignee and owner of the contracts and franchises in said ordinances made and granted, but so it is that neither complainant nor any one on its behalf or on behalf of the corporation named in said ordinances, or of the successors or assigns of said corporations, has at any time during the ten years last past made or filed any statement or report of net earnings as in said ordinance provided.

"That until complainant shall on its part comply with and perform the said terms and conditions of said ordinances, and make and file said statements or reports, it is not entitled to and ought not to receive the aid of this court to enforce said ordinances or contracts against this defendant, and is not entitled to the relief demanded.

"That in and by the ordinances mentioned in paragraphs 12 and 19 of the bill, it is agreed that the grantee company, it successors and assigns, shall annually from and after the year 1897, pay to the city treasurer for the use of the city, five per cent of the net earnings of said railways for the year last past, and that in others of the ordinances of the city and suburban towns mentioned in the bill, like agreements are made to pay to the city or to the city treasurer for its use, a part of the net earnings from said railways. That the said agreements are an important part of the consideration for the grants under which complainant has or claims to have the franchise and right to maintain and operate its said system of street railways and are an important part of the conditions upon which said grants were made.

"That said agreements are obligatory upon complainant as assignee and owner of the contracts and franchises in said ordinances made and granted, but so it is that neither complainant nor any one on its behalf or on behalf of the corporations named in said ordinances or of the successors or assigns of said corporations, has at any time paid or offered to pay to the city or to the city treasurer, any part of said net earnings or any sum agreed to be paid.

"That until complainant shall on its part comply with and perform the terms and conditions of said ordinances, and pay to the city or to the city treasurer for its use, the said portion of net earnings so agreed to be paid, it is not entitled to receive the aid of the court to enforce said ordinances or contracts against this defendant, and is not entitled to the relief demanded."

That the ordinances mentioned in paragraphs 12 and 19 of the bill of complaint provide:

"Cars shall start from both ends of any line as early as six o'clock a. m. and run continuously as late as twelve o'clock, midnight; from six to nine a. m. and from nine o'clock p. m. until midnight, cars shall run at intervals of not more than ten minutes, and from nine o'clock a. m. until nine o'clock p. m. cars shall run at intervals of not more than five minutes."

"A failure to use any track or tracks and run cars thereon as provided, for a period of thirty days, shall be deemed an abandonment of such street or part of street, and the city council may, by resolution, declare such street or part of street abandoned and require said company to remove its tracks from any such street or part of street, and upon failure or refusal of said company to so remove its tracks when notified to do so, the city council may cause the same to be removed at the expense of the company."

That if, as alleged in the bill of complaint, there was a contract between the complainant and the respondent at the time of the passage of the resolution of November 21, 1905, the foregoing provision was a part of such contract; and that for more than thirty (30) days prior to the date when said resolution complained of was passed, the company had failed to use its tracks and run cars on the various lines of such road, as provided in said ordinance.

That by reason of the matters referred to, the respondent had the right, power and authority to pass and enforce the resolution complained of.

(Record, pages 33 and 34.)

To which answer as amended the complainant filed its replication, denying all of the affirmative allegations of the answer of respondent. (Record, page 29.)

Thereafter evidence was submitted on the part of the complainant in support of the allegations of its bill of complaint, and by respondent in denial of such allegations of the bill, and in support of the affirmative allegations in its answer as shown by the record herein.

Thereupon and on the 20th day of February, 1907, the Circuit Court, Hon. Smith McPherson presiding, filed his opinion in said cause. (Record, pages 36 to 45 inclusive.)

Thereafter and on the 22nd day of March, 1907, the Circuit Court, Hon. Smith McPherson presiding, entered a final decree (Record, pages 46 and 47) in which the court finds that the equities of the case are with the complainant and that the complainant has succeeded by purchase to all of the rights under the ordinance of date, December 10, 1866, the said ordinance being one of the city of Des Moines, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, Iowa, which said ordinance is set out as Exhibit "A" in com-

plaintiff's bill of complaint, and that the ordinance as subsequently amended and modified, and as ratified and confirmed by the respondent constitutes and is a valid and existing contract between the complainant, its successors and assigns, and the defendant, the respondent, and that the rights vested in the complainant, its successors and assigns by said contract are perpetual, except only as set forth in Section Ten of said ordinance, by which under said section ten the exclusive feature has expired by limitation of time, and the court decrees that except as to said exclusive feature recited in said section ten, of said ordinance, that the rights vested in complainant, its successors and assigns, by said contract are perpetual, that the complainant has also succeeded to the rights and benefits of divers other ordinances granted by the respondent to divers other corporations, which said several other ordinances are referred to in the bill of complaint of complainant company, that the resolution passed by the city council of respondent on November 21, 1905, and set out in paragraph thirty-two of complainant's bill is cancelled, annulled, set aside, the same being in violation of the rights of complainant company under the obligations of said contract, and further ordered that the respondent, its city council, mayor, city solicitor and all officers of said city, and those hereafter officers of said city and each and all of them now holding office, and all servants, agents and employees and all successors in office be and they are hereby perpetually enjoined from enforcing or attempting to enforce said resolution and from in any manner disturbing, impeding or interfering with the free use or comfortable enjoyment by complainant, its successors or assigns, of any rights, privileges and franchises vested in complainant herein, and vested in any corporation or company or person from which complainant by purchase or otherwise has acquired rights and that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of section ten thereof, shall be preserved perpetually to the complainant, its successors and assigns. Any and all controversies now existing or that may hereafter arise between the complainant, its successors or assigns and the City of Des Moines as respect other ordinances than the one of December 10, 1866 and amendments thereto, are not adjudicated by this decree, and all questions relative to such other ordinances are not determined. To each and all of which respondent excepted.

Thereafter on the 9th day of July, 1907, the respondent filed its petition for appeal to this Honorable Court (Record, pages 47 and 48.)

Thereafter and on the 10th day of July, 1907, said petition was granted and appeal allowed.

Thereafter and on the 10th day of July, 1907, the respondent filed its assignment of errors. (Record, pages 48 to 54.)

SPECIFICATION OF ERRORS RELIED ON.

The appellant states that the Circuit Court erred in the following particulars:

1. That the Circuit Court erred in retaining jurisdiction of the case and in ruling and holding that it had jurisdiction thereof.

2. That the Circuit Court erred in ruling and holding that the equities were with complainant and that complainant was entitled to equitable relief.

3. That the Circuit Court erred in finding the equities of the cause to be with the complainant.

4. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," and set out as Exhibit "A" in complainant's complaint, and the amendments thereto, constitute a valid and subsisting contract between the complainant and respondent.

5. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," set out as Exhibit "A" in complainant's complaint, together with the amendments thereto, has for years been construed by the respondent, the City of Des Moines, as granting a perpetual franchise to the complainant.

6. That the Circuit Court erred in holding that the respondent municipality, City of Des Moines, could, by acts or conduct on the part of its officers, in relation to or in connection with the ordinance of December 10, 1866, grant rights by such acts or conduct in addition

to the rights expressly set forth in said ordinance of December 10, 1866.

7. That the Circuit Court erred in holding that the complainant, The Des Moines City Railway Company, could obtain rights or grants not expressly granted in the ordinance of December 10, 1866, by the acts or conduct of the officers of the respondent municipality, the City of Des Moines, in connection with or in relation to said ordinance of December 10, 1866.

8. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," together with the amendments thereto, has for years been construed as one granting a perpetual franchise.

9. That the Circuit Court erred in holding that the ordinance of December 10, 1866, has been construed or otherwise treated by the respondent municipality, the City of Des Moines, or its officers, as in force or of any validity after the 1st day of January, 1898.

10. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," together with the amendments thereto, creates or constitutes a perpetual grant or contract between complainant and respondent.

11. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," together with the amendments thereto, still exist or are still in force.

12. That the Circuit Court erred in holding and decreeing that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," except as to the exclusive features recited in Section 10 of said ordinance, together with the amendments thereto, are perpetual in the complainant, its successors and assigns.

13. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant, or any of them, under the ordinance of December 10, 1866, as subsequently amended or modified, exist or were in force or effect after January 1, 1898.

14. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," as subsequently amended or modified, are impaired by the resolution of November 21, 1905, which said resolution is complained of.

15. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violated or impaired any right or rights of complainant.

16. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Section 10 of Article 1 of the Constitution.

17. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Article 14 of the Amentments to the Constitution of the United States.

18. That the Circuit Court erred in holding that the enforcement and execution of the resolution of November 21, 1905, (which resolution is complained of) by the respondent in this case, deprives the complainant of its property without due process of law, in violation of Article 14 of the Amendments to the Constitution of the United States.

19. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, was in violation of the obligation of any contract existing between the complainant and the respondent, and especially in holding that the same was in violation of the ordinance of December 10, 1866, as subsequently amended and modified.

20. The Circuit Court erred in ordering, adjudging and decreeing that the resolution complained of, of November 21, 1905, as set out and contained in paragraph 32 of complainant's bill, be cancelled, annulled, set aside, and held for naught.

21. That the Circuit Court erred in granting an injunction restraining the respondent and its officers from enforcing and executing, or attempting to enforce and execute the resolution of November 21, 1905, set out in paragraph 32 of complainant's bill of complaint.

22. That the Circuit Court erred in granting an injunction restraining respondent and its officers from disturbing, impeding or interfering with the complainant in the enjoyment of the rights and privileges claimed by it under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," as subsequently amended and modified.

23. That the Circuit Court erred in granting an injunction, and ordering, adjudging and decreeing that the respondent, the City of Des Moines, its city council and mayor and city solicitor, and all officers of said city and those hereafter officers of said city, and all servants, agents and employes, and all their successors in office, be enjoined from, in any manner, disturbing, impeding or interfering with the free use and comfortable enjoyment by said Des Moines City Railway Company, its successors or assigns, of any rights, privileges and franchises vested in complainant, and vested in any corporation or company or person from whom complainant, by purchase or otherwise, has acquired rights.

24. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of Section 10 thereof, shall be perpetual to the complainant, its successors and assigns.

25. That the Circuit Court erred in granting an injunction, and adjudging and decreeing that the City of Des Moines and its officers, including the City Solicitor, be enjoined from bringing or maintaining an action or actions in court to ascertain and determine the respective rights of complainant and respondent.

26. That the Circuit Court erred in ordering and decreeing that the respondent and its officers be enjoined from bringing or maintaining an action or actions in court to oust complainant from the streets, alleys and public places of the respondent municipality.

27. That the Circuit Court erred in ordering, decreeing and enjoin-

ing the respondent and its officers from bringing or maintaining an action or actions in court to test the rights of complainant to operate street railways in the respondent municipality, the City of Des Moines.

28. That the Circuit Court erred in not defining what rights, privileges and franchises were vested in the complainant under the various ordinances and franchises upon which it based its right to recover in this suit.

29. That the Circuit Court erred in not holding that the rights and privileges acquired and owned by the Des Moines City Railway under the ordinance of December 10, 1866, as subsequently amended and modified, expired on January 1, 1898.

30. That the Circuit Court erred in holding, adjudging and decreeing that the resolution of the city council of the respondent city passed on November 21, 1905, and set out in paragraph 32 of complainant's bill of complaint, was a law.

31. That the Circuit Court erred in holding that the City of Des Moines had the power or authority vested in it to grant a perpetual right or franchise to construct, operate or maintain a street railway over or upon the streets, alleys and public places of the City of Des Moines.

32. That the Circuit Court erred in holding that the respondent, the City of Des Moines, had the power or authority on December 10, 1866, to grant a perpetual right to construct, maintain or operate a street railway upon, over or along the streets, alleys and public places of the City of Des Moines.

33. That the Circuit Court erred in holding that the City of Des Moines was, at any time after December 10, 1866, granted or given the power or authority to grant or pass a franchise or ordinance or make a contract granting or vesting in any person, firm or corporation the right or privilege to construct, maintain or operate a street railway over, upon or along the streets, alleys and public places in the City of Des Moines in perpetuity.

34. That the Circuit Court erred in holding that the City of Des Moines at any time ever granted, ratified or confirmed any grant in perpetuity, to construct, maintain or operate a street railway over,

along or upon the streets, alleys and public places of the City of Des Moines.

35. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right to construct, maintain or operate street railways upon, along or over the streets, alleys and public places of the City of Des Moines under the ordinance of December 10, 1866, as subsequently amended and modified.

36. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right and privilege, granted to it by ordinance or otherwise, to construct, maintain or operate street railways upon, over or along the streets, alleys and public places in the City of Des Moines.

37. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, as subsequently amended and modified, was a valid, subsisting contract between the complainant and the respondent, and that thereunder, the complainant had the right to construct, maintain and operate street railways over, along or upon the streets, alleys and public places of the City of Des Moines, which said right exists in perpetuity.

38. That the Circuit Court erred in refusing to determine the rights of complainant under each of the ordinances or franchises declared on its bill of complaint.

39. That the Circuit Court erred in refusing to determine all of the questions at issue as tendered by the allegations of the bill of complaint and the allegations of the respondent's answer.

40. That the Circuit Court erred in holding that "the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, or persons, which said several other ordinances are referred to in the bill of complaint of complainant."

41. That the Circuit Court erred in holding that "the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, which said several other ordinances are referred to in the bill of complaint of complainant company," without also stating and finding what other corporations and what other ordinances are in-

tended or referred to, and without fixing and determining the rights of the parties under each of said ordinances and franchises.

42. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding and interfering with the use and enjoyment by complainant of rights, privileges or franchises under ordinances respecting which controversies existing or hereafter arising are said not to be adjudicated.

43. That the Circuit Court erred in holding that all of complainant's street railways were constructed or operated under authority of the ordinance of December 10, 1866.

44. That the Circuit Court erred in holding that the resolution of November 21, 1905, is a law or legislative act.

45. That the Circuit Court erred in holding that the resolution of November 21, 1905, was an attempt to repeal, amend or modify the ordinance of December 10, 1866, as subsequently amended or modified.

Respondent's position in reference to this case is substantially as follows:

First. That the Circuit Court was without jurisdiction to hear and determine the case.

Second. That there was no showing which entitled the complainant to equitable relief.

Third. That the City of Des Moines was not vested with the power by the legislature of the State of Iowa on December 10, 1866, to grant a franchise for the use of its streets, alleys and public places for street railway purposes.

Fourth. That at the time of the adoption of the ordinance or franchise of December 10, 1866, nor at any subsequent time did the City of Des Moines have the power or authority granted to it by the legislature of the State of Iowa to execute and grant a franchise for the use of its streets, alleys and bridges unlimited as to time or in perpetuity.

Fifth. The franchise or ordinance of December 10, 1866, is not by its terms a grant in perpetuity.

Sixth. That the ordinance or franchise of December 10, 1866, expired by limitation of time as provided by its terms on January 1, 1898.

SEVENTH. That by its conduct the municipality, the City of Des Moines, has not construed the ordinance or franchise of December 10, 1866, as still in force, or as constituting a valid and binding contract in perpetuity in any event, and is not estopped to deny that such ordinance or franchise has expired by limitation of time.

EIGHTH. That the appellee has no right to maintain and operate its street railway system under any franchise granted by the City of Des Moines or any of the municipalities which were incorporated into the City of Des Moines in 1890.

BRIEF ON POINTS INVOLVED.

I.

The United States Circuit Court was without jurisdiction to hear and determine this cause.

1. The question of jurisdiction precedes any inquiry into the merits.

Oregon vs. Hitchcock, 202. U S., 60-68;
Whitney vs. Dick, 202 U. S., 132-135.

2. The question of jurisdiction was clearly raised and decided in the court below (record page 28-36), and while not referred to in the assignment of errors (record page 48), is, notwithstanding, before this court, and would be even if it had not been suggested in the court below.

Act of March 3rd, 1875, Sec. 5;
Briggs vs. Traders Company, 135 Fed. R., 254-257;
Hartog vs. Memory, 116 U. S., 588-590;
Williams vs. Nottawa, 104 U. S., 209-211.

3. Whether a case presents a Federal question must be determined from the allegations of fact in the bill, giving them their natural and logical meaning and application, without regard to the arguments, conclusions and surmises stated.

Devine vs. Los Angeles, 202 U. S., 313-333;
Houston and T. C. R. Co., vs. Texas, 177 U. S., 66-78;
St. Joseph & G. I. R. Co. vs. Steele, 167 U. S., 659-662;
Chappell vs. Waterworth, 155 U. S., 102-108;

Arkansas vs. Kansas & T. Coal Co., 183 U. S., 185-188;
Western Union Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., 243;
Hamblin vs. Western Land Co., 147 U. S., 531-532;
Galveston & S. A. R. Co. vs. State of Texas, 170 U. S., 226-236;
Simpkins Suit in Equity, p. 95.

4. If it appears from the entire record that a case does not really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court, jurisdiction must be denied.

Act of March 3rd, 1875, Sec. 5;
Williams vs. Nottawa, 104, U. S., 209-212;
Morris vs. Gilmore, 129 U. S., 315;
Wetmore vs. Rymer, 169 U. S., 115-120;
Barrie vs. Edmunds, 116 U. S., 550;
Deputron vs. Young, 134 U. S., 241;
Simon vs. House, 46 Fed. R., 317;
Maxwell vs. A. T. & S. F. R. Co., 34 Fed. R., 286;
Holden vs. Utah M. & M. Co., 82, Fed. R., 209;
Bank of Arapahoe vs. David Bradley & Co., 72 Fed. R. 867;

5. The resolution of the City Council of Des Moines of November 21st, 1905, (record page 15) does not infringe the provisions of Section 10, Article One of the Constitution, to-wit:

"No state shall pass any law impairing the obligations of contracts."

a. The prohibition of Section 10, Article One, of the Constitution is aimed at the legislative power of the State, and to come within its inhibition there must be a law of the State or an enactment from some source to which the State gives the force of law.

New Orleans Water Co. vs. Louisiana Sugar Co., 125 U. S., 18-32-38;
Iron Mountain Ry. Co. vs. Memphis, 96 Fed. R., 113;
Williams vs. Bruffy, 96 U. S., 176-183;
Lehigh Water Company vs. Easton, 121 U. S., 388-392;

b. If an enactment is susceptible of two meanings, one in conflict with the Constitution and the other not, the Court should adopt the latter.

State vs. Stevens, 112 Wis., 170;
Wheeler vs. Herbert, 92 Pac., (Cal.) 353, 358;
Munn vs. Ill., 94 U. S., 113-123;
C. & N. W. Ry. Co. vs. Dey, 35 Fed. R., 866-874;
Fletcher vs. Peck, 6 Cranch, 87-128;
Sweet vs. Rechel, 159 U. S., 393;
United States vs. Boyer, 85 Fed. R., 430;
Thorn vs. San Francisco, 4 Cal., 159.

c. The resolution is not a law.

Code of Iowa, 1897, Sec. 680:

"Municipal corporations shall have power to make and publish from time to time ordinances not inconsistent with the laws of the state for carrying into effect and discharging the powers and duties conferred by this Title * * * *."

Cascaden vs. Waterloo, 106 Iowa, 673, 681, 682;
Martin vs. Oskaloosa, 126 Iowa, 680-685;
Shelby vs. Burlington, 125 Iowa, 343;
Jones vs. McAlpine, 64, Ala., 512;
Blanchard vs. Bussell, 11 Ohio State, 96-103;
City vs. Sears, 2nd Colo., 588;
Am. & Eng. Ency. Law, 2nd, Ed., Vol 21, p. 947;
Chicago Ry. Co. vs. Chicago, 174 Ill., 439;
San Antonio vs. Mickeljohn, 89 Tex., 79;
People vs. Mount, 186 Ill., 560-571;
Cape Girardeau vs. Foufeu, 30 Mo. App., 511-556;
Fairchild vs. St. Paul, 49 N. W., 325;
State vs. Bayonne, 35 N. J. Law, 335;
McQuillin Municipal Ordinances, Sec. 2;
Dillon on Municipal Corporations, 4 Ed., 236;
Eckert vs. Walnut, 117 Iowa, 629;
Zalesky vs. Cedar Rapids, 118 Iowa, 774.

d. The resolution was not enacted in the manner required for the enactment of an ordinance, and therefore, cannot be construed to be an ordinance.

Code of Iowa, 1897, Sec. 681:

"No ordinance shall contain more than one subject, which shall be clearly expressed in its title, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed."

Code of Iowa, 1897, Sec. 682:

"Ordinance of a general or permanent nature and those for the appropriation of money shall be fully and distinctly read on three different days, unless three-fourths of the Council shall dispense with the rule."

Cape Girardeau vs. Foufeu, 30 Mo. App., 511-556;

City of Alma vs. Guaranty Savings Bank, 19 U. S. App., 622-628;

State vs. Bayenne, 35 N. J. Law, 235;

Iron Mountain Ry. vs. Memphis, 96 Fed. R., 113;

Dillon on Municipal Corporations, 4 Ed., 436;

McQuillin Municipal Ordinances, Sec. 2;

Strohm vs. Iowa City, 47 Iowa, 42.

e. The contract of the complainant, if it has one, is set forth in the ordinance, and an ordinance cannot be amended or repealed except by an ordinance, and the resolution is therefore void as a matter of state law.

Code of Iowa, 1897, Sec. 681; (Quoted above.)

Cascaden vs. Waterloo, 106 Iowa, 673-681-682;

People vs. Mount, 186 Ill., 560-571.

f. If the effect of the resolution would be to impair the obligation of contracts, or to deny due process of law or equal protection of law, it contravenes the Constitution of Iowa and is void as a matter of state law.

Constitution of Iowa, Art. 1, Sec. 21:

"No * * * * * law impairing the obligation of contracts shall ever be passed."

Constitution of Iowa, Art. 1, Sec. 9:

" * * * * * No person shall be deprived of life, liberty or property without due process of law."

g. If an attempt to legislate is void under the state law no Federal question arises under it for it is not a law.

Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-266;
Munway vs. Charleston, 96 U. S., 432-440;
Williams vs. Bruffy, 96 U. S., 176-183;
Lehigh Water Company vs. Easton, 121 U. S., 388-392;
New Orleans Water Works vs. La. Sugar Co., 125 U. S., 31-38;
Shreveport vs. Cole, 129 U. S., 36.

h. The resolution was not a legislative act, but was passed for administrative and executive purposes only.

Testimony of W. H. Brenner, Record, p. 364-365-366;
Answer, Pars. 26-27-28-29-31; Record p. 26-27-28;
Cumberland vs. Evansville, 77 Ind., 542-550-551;
St. Paul Gas Light Company vs. St. Paul, 181 U. S., 142;
Cape May vs. Cape May D. B. & S. P. Ry. Co., 60 N. J. Law. 224; 39 L. R. A., 609; 37 At. R., 892.

6. The resolution of November 21, 1905 (record p. 15) does not infringe the provisions of Sec. 1 of the 14th Amendment to the Constitution of the United States relating to due process of law.

a. Law in its regular course of administration is due process and when secured by the law of the state the constitutional requirement is satisfied.

2nd Kent Com., 13;
Davidson vs. New Orleans, 96 U. S., 97;
Hurtado vs. People, 110 U. S., 516;
Hager vs. Reclamation District, 111 U. S., 701;
Merchant vs. Railroad Company, 153 U. S., 280;
Leidley vs. Land Company, 159 U. S., 103;
Orient Insurance Co., vs. Daggs, 176 U. S., 557;
Caldwell vs. Texas, 137 U. S., 692-697;
Lepper vs. Texas, 139 U. S., 462, 468.

b. The resolution shows that the City only intended to proceed by due process of law.

Cape May vs. Cape May D. B. & S. P. Co., 60 N. J. Law, 224; 39 L. R. A., 609; 37 At. R., 892;

c. The intention of the Council in passing the resolution was to cause proceedings to be instituted in a Court of competent jurisdiction.

Answer, par. 27-28, Record p. 27;
Exhibit D, Record p. 362;
Testimony of W. H. Bremner, Record, p. 364-365-366;
Sec. 35, Ordinance No. 097 of the City of Des Moines, Record p. 399.

II.

The complainant below was not entitled to equitable relief.

1. Danger of judicial proceedings is not an injury justifying an injunction.

High on Injunctions, Vol. 1, Sec. 64;
Wolf vs. Burke, 56 N. Y., 116;
Wallace vs. Society, 67 N. Y., 23;
Cape May vs. Cape May D. B. & S. P. R. Co., 60 N. J. Law, 224; 39 L. R. A., 609; 37 At. R., 892;
Detroit vs. Detroit City Ry. Co., 56 Fed. R., 867-898.

2. The complainant below having secured passage of the resolution of which complaint is made, is not entitled to relief.

Testimony of W. H. Bremner, Record p. 366-367-368.

3. The complainant below was not entitled to equitable relief, because the allegations of the bill are denied by the answer and are not sustained by the evidence.

III.

Municipalities in Iowa have not the power to grant to a street railway the right to occupy streets in perpetuity.

1. Cities have no inherent jurisdiction to make laws or regulations of government. They are governments of enumerated powers acting by delegated authority.

Clark vs. City of Des Moines, 19 Iowa, 199-212-214;
City of Keokuk vs. Scroggs, 39 Iowa, 447-450;
Brockman vs. Creston, 79 Iowa, 599;

Becker vs. Water Works Company, 79 Iowa, 422;
Aldrich vs. Payne, 106 Iowa, 461-7.

2. A municipality has not inherent power to authorize a street railway company to lay tracks on its streets, but must have express authority therefor. Streets and highways are under the exclusive control of the legislature.

Dillon on Municipal Corporations, Secs. 716-717;
Davis vs. New York, 14 N. Y., 514-517;
Milhau vs. Sharp, 27 N. Y., 611-619-622;
Coleman vs. Second Avenue Ry. Co., 38 N. Y., 201;
Potter vs. Collins, 156 N. Y., 16; 50 N. E., 413-15;
Covington Street Ry. Co. vs. City of Covington, 9 Busch 127, (Ky.)
Chicago vs. Evans, 24 Ill., 52;
Peoples Railroad Co. vs. Central Ry Co., 51 Cal., 583;
Atlantic R. R. Co. vs. St. Louis, 66 Mo., 228;
Denver Street Ry. Co. vs. Denver, 2nd Colo., 673;
Govin vs. Chicago, 132 Fed. R., 848-854;
Stanley vs. City of Davenport, 44 Iowa, 463-468;
Sears vs. Marshalltown Street Ry. Co., 65 Iowa, 742-743;
Dickinson County vs. Faus, 112 Iowa, 21-23.

3. A municipality under a grant of power to lay off, open, widen, straighten or to narrow or to vacate, or to extend, improve or keep in order and repair streets, does not have the power to authorize the construction of a street railway.

Davis vs. Mayor of New York, 14 N. Y., 514-517;
Stanley vs. City of Davenport, 54 Iowa, 463-67-68;
Detroit Citizens Street Ry Co. vs. City of Detroit, 64 Fed. R., 628-635;
Peoples Railroad Co. vs. Memphis R. R. Co., 10 Wallace, 38;
Govin vs. City of Chicago, 132 Fed. R., 848-854.

4. In 1866 the City of Des Moines had no power to authorize the construction of a street railway on its streets, the only power possessed by it in reference to streets being given by Sec. 1064 of the Revision of 1860.

Revision of 1860, Sec. 1064:

"They (cities) shall have power to lay off, open, widen, straighten, or to narrow or vacate or to extend and establish, to improve or keep in order and repair, and to light streets, alleys * * *"

5. In 1873 the legislature of Iowa granted to municipalities the power to authorize or forbid the laying down of street railway tracks.

Code 1873, Sec. 464:

"They (cities) shall also have the power to authorize or forbid the location and laying down of tracks or railways and street railways on all streets, alleys and public places."

6. In 1874 the City of Des Moines ratified the ordinance of December 10th, 1866.

Record, p. 637;

Des Moines Street R. R. Co. vs. Broad Guage Street Ry. Co., 73 Iowa, 513;

7. A municipality cannot grant an exclusive or perpetual right to lay down and operate street railways over its streets unless it is so authorized and empowered by the legislature by a grant in specific and explicit terms. Authority to authorize or prohibit the use of streets by a street railway is not sufficient.

Davis vs. New York, 14 N. Y., 514;
Milhau vs. Sharp, 27 N. Y., 611-19-22-23;
Railway Company vs. Mayor of New York, 4 N. Y., 406;
Louisville City Ry. Co. vs. Louisville, 8 Busch (Ky.) 415;
Eickles vs. Railway Company, 78 Ind., 261;
State vs. Trenton, 36 N. J. Law, 79;
Nash vs. Lowrey, 37 Minn., 263; 33 N. W., 787;
Long vs. City of Duluth, 51 N. W., 913-14;
State vs. Minnesota Thresher Co., 83 N. W., 32-35;
Brenham vs. Brenham Water Co., 4 S. W., (Tex.) 143-152;
Thrift vs. Elizabeth City, 30 S. E. (S. C.) 349;
Lake Roland Ry Co. vs. Mayor of Baltimore, 26 At. R., 510;
Penn. R. R. Co. vs. Canal Commissioners, 21 Pa. State, 9-22;
Logan & Son vs. Pyne, 43 Iowa, 524-25;
Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234-241;

State vs. Cincinnati Gas Light Company, 18 O. State, 294-295-296;

Jackson County Horse Car Co. vs. Interstate R. T. Co., 24 Fed. R., 306-7-8;

Saginaw Gas Light Company vs. Saginaw, 28 Fed. R., 529-34;

Grand Rapids E. E. L. Co. vs. Grand Rapids, 33 Fed. R., 659;

Citizens Street Ry. Co. vs. City Ry. Co., 64 Fed R., 627-635;

Logansport Ry. vs. City of Logansport, 114 Fed. R., 688;

Cleveland Electric Ry. vs. City of Cleveland, 137 Fed. R., 111-122-23;

Wright vs. Nagle, 101 U. S., 791-6;

Ottawa vs. Carey, 108 U. S., 110-122;

Citizens Street Ry. Co. vs. Detroit Street Ry. Co., 171 U. S., 48-53-54;

Minturn vs. La Rue, 23 Howard, 435;

Railway Co. vs. Philadelphia, 101 U. S., 528-39;

Cooley on Constitutional Limitations, 7 Ed., 296;

Dillon on Municipal Corporations, 4 Ed., Sec. 91, 715-716;

Home Telephone and Telegraph Co. vs. Los Angeles, Decided Nov. 30, 1908, by U. S. Supreme Court.

8. The policy of the state of Iowa has always been to prohibit the granting of franchises or special rights or privileges in perpetuity.

Constitution of Iowa, Sec. 12, Art. 8.

"Subject to the provisions of this Article the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, * * * and no exclusive privileges, except as in this Article provided, shall ever be granted."

Sec. 1090, Code 1873, now Sec. 1610, Code 1897:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof whenever the General Assembly shall deem necessary for the public good."

Mayor of Houston vs Houston City Ry. Co., 19 S. W., 127-129;
Nash vs. Lowrey, 33 N. W., (Minn.) 787-8;
Flynn vs. Little Falls E. & N. Co., 77 N. W. (Minn.) 38-39;
Sioux City Ry. Co. vs. Sioux City, 78 Iowa, 742;
Sioux City Ry. Co. vs. Sioux City, 78 Iowa, 364;
City of Des Moines vs. Des Moines Water Works Co., 95 Iowa, 348;
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234-241;
Thrift vs. Elizabeth City, 122 N. C., 31; 44 L. R. A., 427-9;
Grand Rapids E. E. L. Co. vs. Grand Rapids, 33 Fed. R., 659-672;
Detroit Citizens Street Ry. vs. City of Detroit, 64 Fed. R., 628-37-41;
Logansport Street Ry. Co. vs. Logansport, 114 Fed. R., 688-93;
Turnpike Co. vs. Illinois, 96 U. S. 63-68;
Railway Company vs. Philadelphia, 101 U. S. 528;
Sioux City Ry. vs. Sioux City, 138 U. S., 98-107-108;
Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-269-70;
Schurtz vs. Cook, 148 U. S., 410;
N. Y. & N. E. Ry. vs. Bristol, 151 U. S., 556;
Shields vs. Ohio, 95 U. S., 319-324.

IV.

The ordinance of 1866, by its terms limits the life of the grant to thirty years from the time the first mile of track was laid and in use.

1. Section one of the ordinance grants authority to maintain and operate the railway, "for the time and upon the conditions hereinafter mentioned." (Exhibit A, Record p. 18.) The only time thereafter mentioned in the ordinance is found in Sec. 10 thereof, which provides, "The right herein granted to said Company shall be exclusive for thirty years from the time the first mile of track is laid and cars running thereon." (Sec. 1, Exhibit A, Record p. 18; Sec. 10, Exhibt A, Record p. 20.)

2. The first mile of track was laid and in use January 1, 1868, and the thirty-year period expired January 1st, 1898.

Testimony of M. P. Turner, Record p. 459.
Opinion of the Court, Record p. 38.

3. In construing grants from the public the rule is that nothing passes by implication, and if the contract or grant is ambiguous or doubtful the construction is against the grantee and in favor of the public.

Charles River Bridge vs. Warren Bridge, 11 Peters, 420;
Dillon on Municipal Corporations, 4 Ed., Sec. 91;
Oregon R. & N. Co. vs. Oregonian R., 130 U. S., 1-26;
Blair vs. Chicago, 201 U. S., 400-463-471-2-3;
Perrine vs. Chesepeake Canal Co., 9 Howard, 172-192;
Henry vs. Mason City & F. D. R. R. Co., 118 N. W., 310-11;
Dubuque R. R. vs. Litchfield, 23 Howard, 66-88;
Turnpike Co. vs. Illinois, 96 U. S., 63;
Fertilizing Co. vs. Hyde Park, 97 U. S., 659-666;
Slidell vs. Grand Jean, 111 U. S., 412-438;
Coosaw Mining Co., vs. S. C., 144 U. S., 500;
Metropolitan Street Ry. Co. vs. Bd. of Tax Com., 199 U. S., 1-36
Knoxville Water Co. vs. Knoxville, 200 U. S., 22-23;
Clark, Dodge & Co. vs. Davenport, 14 Iowa, 494-500;
Logan & Son vs. Pyne, 43 Iowa, 424-5;
Keokuk Water Co. vs. Keokuk, 80 Iowa, 137;
Aldrich vs. Paine, 106 Iowa, 461-7;
Lacey vs. Davis, 112 Iowa, 106-9;
Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234-241;
Richmond County Gas Light Co. vs. Middleton, 59 N. Y., 228;
Syracuse Water Company vs. Syracuse, 116 N. Y., 167;
Parkhurst vs. City, 32 Pa., 304;
Birmingham Ry. vs. Birmingham, 79 Ala., 468;
Long vs. City of Duluth, 51 N. W., 913-14;
Penn. Ry. vs. Canal Commissioners, 21 Pa., 22;
The Binghampton Bridge, 3 Wallace, 51-75;
Minturn vs. La Rue, 23 Howard, 433-6;
Jackson County H. Ry. Co. vs. Interstate R. T. Co., 24 Fed. R., 306-7-8;

Saginaw Light Co. vs. Saginaw, 28 Fed. R., 528-539;
Omaha Ry. Co. vs. Cable Tramway Co., 30 Fed. R., 324-8;
Grand Rapids R T. Co. vs. Grand Rapids E. L. Co., 33 Fed. R., 659-667;
Rice vs. Railroad Co., 1st Black. (U. S.) 358-379-80;
Turnpike Co. vs. Illinois, 96 U. S., 63-68;
Wright vs. Nagle, 101 U. S., 791;
Hannibal R. R. Co. vs. Packet Co., 125 U. S., 260-271;
Central Transportation Co. vs. Pullman Car Co., 139 U. S., 24-49;
Stein vs. Bienville Water Co., 141 U. S., 67-80-81;
Water, Light & Gas Co. vs. City of Hutchinson, 207 U. S., 385-393;
Dillon on Municipal Corporations, 4 Ed., Secs. 89-91.

4. In construing a statute or ordinance, if two constructions are possible, one of which will render the enactment void while the other will sustain it, the latter will be adopted.

Santo vs. State, 2nd Iowa, 165-208;
Manson vs. Springer, 15 Iowa, 304;
Stewart vs. Board of Supervisors, 30 Iowa, 9;
State vs. Forkner, 94 Iowa, 733;
McGuire vs. Railway Company, 131 Iowa, 340.
State vs. Anson, 112 N. W., 475 (Wis.).

5. To adopt the construction that the ordinance of 1866 granted a right in perpetuity would render the contract void.

See Division III, supra.

6. If by its terms the ordinance of 1866 expired January 1st, 1898, no acts of the City Council of the City of Des Moines or of the Street Railway Company subsequent thereto could serve to extend it.

Code of Iowa, 1897, Sec. 775:

"Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires and the poles and other supports thereof * * *."

Code of Iowa, 1897, Sec. 776:

"No franchise shall be granted, renewed or extended by any

city or town for the use of its streets, highways, avenues, alleys, or public places, for any of the purposes named in the preceding section unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election."

Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 233-255;

Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E., 327;

Grand Rapids Bridge Co. vs. Prange, 24 Am. Rep., 585 (Mich.).

Detroit vs. Detroit Street Railway Co., 60 Fed. R., 161-164-175;

Citizens Street Ry. Co. vs. City Ry. Co., 64 Fed. R., 647-652-653.

7. The meaning of the ordinance must be gathered from the law itself and not from contemporaneous statements of the individuals who framed it or those who voted for it.

McQuillin Municipal Ordinances, Par. 292;

Ah Kow vs. Nunan, 5 Sawyer, 552-560-561;

Blair vs. Chicago, 201 U. S., 400.

V.

The appellee can claim no rights under the franchises granted by the City of Des Moines other than the ordinance of 1866.

1. The failure to comply with the terms of a franchise will constitute an abandonment thereof.

City of Tower vs. Tower City Ry. Co., 71 N. W., 691-2-3. (Minn.)

United States vs. Repentinguy, 72 U. S., (3 Wall.) 217-67-68;

Shellenberg vs. Harriman, 88 U. S., (21 Wall.) 44-63-64;

Farnsworth vs. M. & P. Ry. Co., 92 U. S., 49-66-67-68;

Township of Plymouth vs. Chestnut Hill Ry. Co., 32 At. R. 19-20 (Pa.).

2. Non user coupled with intention to abandon will constitute an abandonment.

Henderson vs. Central Passenger Ry. Co., 21 Fed., 357-68-69;

Louisville Trust Co. vs. Cincinnati, 76 Fed., 296-315;

Wright vs. Milwaukee E. Ry. Co., 69 N. W., 791-4 (Wis);

People vs. Broadway Ry. Co., 26 N. E., 961-3-4-5-6;

Welsh vs. Taylor, 31 N. E., 896-8;
Hazzader vs. Carroll, 76 Fed., 474-5.

3. The franchise granted to the Des Moines Broad Guage Railroad Company requires it to pay into the city treasury five per cent of the net earnings after ten years from the date of the grant. This payment has never been made.

Sec. 21, Exhibit 57, Record p. 144;
Testimony of G. B. Hippee, Record p. 615.

4. The franchise granted the Des Moines Broad Guage Railroad Company also requires that it obtain permission of the City Council before laying tracks on streets other than those mentioned in the ordinance. This has not been complied with.

Sec. 3, Exhibit 57, Record p. 140;
Testimony of G. B. Hippee, Record p. 615.

5. The franchise granted to the Des Moines River Line Street Railway Company requires it to pay five per cent of its net earnings to the city after the expiration of ten years from the date of the grant. This payment has never been made.

Exhibit 135, Sec. 21, Record p. 266;
Testimony of G. B. Hippee, Record p. 615.

6. The franchise granted to the Des Moines River Line Street Railway Company authorizes the use of steam only as a motive power.

Sec. 2 of Exhibit No. 135, Record p. 261.

7. The franchise granted the Des Moines Belt Line Railway Company authorizes the use of steam and electric motor only as a motive power.

Sec. 5, Exhibit 125, Record p. 244.

8. The franchise granted to the Des Moines & Sevastapol Railway authorizes the use of animal power only as a motive power.

Sec. 2, Exhibit 91, Record p. 202.

9. The Des Moines City Railway Company operates its cars by means of electricity supplied from an overhead wire.

Testimony of G. B. Hippee, Record p. 541.

10. The franchise granted to the Des Moines Rapid Transit Company contains no words of succession.

Sec. 1, Exhibit 112, Record p. 225;
Sec. 1, Exhibit 114, Record p. 227,

11. A franchise containing no words of succession or assignment cannot be sold or transferred.

Thomas vs. Railroad Company, 101 U. S., 71;
Penn. Ry. vs. St. Louis Ry. Co., 118, U. S., 290-300;
Oregon Ry. vs. Oegonian Ry. & Navigation Co., 130 U. S., p. 1;
Central Transportation Company vs. Pullman Company, 139 U. S., 24-48.

VI.

The appellee can claim no rights under the franchises granted by the suburban towns which were annexed to Des Moines in 1890.

1. Upon the incorporation of the suburban towns into the city of Des Moines all the franchises and contracts granted by them terminated.

People vs. Chicago Telephone Co., 77 N. W., 245;
Blair vs. Chicago, 201 U. S., 400-487.

2. Many of the franchises granted by the suburban towns contain no words of succession or assignment, and could not be transferred.

Division V, sub-division 11, supra.

VII.

The appellant is not estopped from questioning the right of the appellee to occupy its streets.

1. To be available matters in estoppel must be especially pleaded.

Golden vs. Hardesty, 93 Iowa, 622;
First National Bank vs. Zims, 93 Iowa, 140;
Jackson vs. Linn, 94 Iowa, 140;
Nicholas vs. C. R. I. & P. Ry. Co., 90 Iowa, 85;
Spencer Company vs. Papach, 103 Iowa., 513;
Cloud vs. Malvin, 75 N. W., 645.

2. A street railway in possession of streets after the expiration of its franchise is a mere tresspasser.

Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E., p. 327;
Cedar Rapids Water Company vs. Cedar Rapids, 91 N. W., 1081; 118 Iowa, 234-249;
Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-269-270.

3. The fact that the company has made expenditures since the expiration of its franchise and that the value of the property will be affected by the forfeiture is immaterial.

Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234-255;
Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-269-270;
Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E. 327;
Detroit vs. Detroit City Ry. Co., 60 Fed. R., 161-164-175.

4. Expenditures in improvements after the expiration of the franchise will not operate as a renewal thereof.

Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E., 327;
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 235-249;
Detroit vs. Detroit City Ry. Co., 60 Fed. R., 161-164-175.

5. The City Council or other officers of the City of Des Moines could not by their acts estop the city from questioning the rights of the Street Railway Company, since to grant, renew or extend a franchise of this kind requires the consent of the electors.

Code of Iowa, 1897, Secs. 775-776, heretofore quoted.
Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E. 327;
Detroit vs. Detroit Street Ry. Co., 60 Fed. R., 161-164.

6. To constitute an estoppel or waiver the acts of the officers relied on must have been within the scope of their authority and power.

Cedar Rapids Water Company vs. Cedar Rapids, 91 N. W., 1081-1088; 118 Iowa, 239-254;
Detroit vs. Detroit Street Ry. Co., 60 Fed. R., 161-164;
Rhinehart vs. Redfield, 87 N. Y. S., 789-799-702;
Smith vs. Town of Westerly, R. I., 35 At. 526;

Seager vs. Mueller (*Ill.*) 24 N. W., 513-514;
Nealy vs. Hagerstown (*Md.*) 48 At., 746;
Driscoll vs. New Haven, (*Conn.*), 52 At., 618-19-20;
Penn. R. R. Co. vs. Hamilton Township, (*N. J.*), 51 At., 926-7;
Snyder vs. City of Mt. Pulaski, 52 N. E., 62-63;
City vs. Minnesota Transfer Co., 83 N. W., 32-35;
Noel Young Bond & Stock Co. vs. Mitchell County, 54 S. W., 284-8.
Unionville vs. Morton, 68 S. W., 605-608. (Mo.)
Wormstead vs. Linn, 68 N. E., 841-2-3. (Mass.)
Marsh vs. Fulton Co., 10 Wall., 676;
City of Lancaster vs. Miller, 51 N. E., 54;
Detroit vs. Detroit City Ry. Co., 60 Fed. R., 161;
Forest vs. St. Frances Levee Dist., 77 Fed. R., 555-561.

ARGUMENT.

I.

JURISDICTION.

The United States Circuit Court was without jurisdiction to try and determine the case at bar.

The question of jurisdiction preceeds any inquiry into the merits.

Oregon vs. Hitchcock, 202 U. S., 60-68;
Whitney vs. Dick, 202 U. S., 132-135.

In the bill, jurisdiction is claimed because the resolution impairs the obligation of complainant's contract, and because the acts complained of do and will deprive complainant of its property without due process of law. (Record p. 17.) This is controverted in the answer where jurisdiction is expressly denied. (Record p. 28.) In the opinion filed it was held that the Circuit Court had jurisdiction. (Record p. 36.) The question was clearly raised and decided in the Circuit Court, and while not referred to in the assignment of errors, (Record p. 48) the question is nevertheless before the Supreme Court even if it had not been suggested in the court below.

Act of March 3, 1875, Sec. 5;
Briggs vs. Traders Co., 135 Fed., 254, 257;

Hartog vs. Memory, 116 U. S., 588, 590;
Williams vs. Nottawa, 101 U. S., 209, 211.

In *Devine vs. Los Angeles*, 202 U. S., 313-333, it was said:

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed." It is further said, page 337: "The questions as to the nature and extent of complainant's titles or rights, as put forward in the bill, are not Federal questions, but are questions of state or general law," citing *San Francisco vs. Scott*, 111 U. S., 768; *Powder Works vs. Davis*, 151 U. S., 389; *Hooker vs. Los Angeles*, 188 U. S., 314. And on p. 338, it is held that the allegations in the answer may be regarded in determining jurisdiction.

In the case at bar, the Court can retain jurisdiction only upon the direct allegations of fact in the bill, and must give them their natural and logical meaning and application, without regarding the arguments, conclusions and surmises stated, and will not retain jurisdiction merely because of a controversy over the existence, nature and extent of the rights, privileges and franchises claimed.

It is claimed by the complainant that the resoution complained of impairs the obligation of its contracts, and will deprive it of its property without due process of law, and denies the equal protection of the law. If these claims are true, then the resolution is within the prohibition of the Federal Constitution and there is a Federal question in the case.

On the other hand, it is contended by the defendant that the resolution is not a legislative act, is not an enactment to which the state has given the force of law, is an administrative or executive act only, and that its only purpose is to authorize the prosecution of proceedings in court to determine the respective rights of complainant and defend-

ant. If these claims are true, then the matters complained of, are not within the prohibition of the Federal Constitution and there is no Federal question in the case.

In construing the resolution for the purpose of ascertaining whether the record presents a Federal question, if it is found that the enactment is susceptible of two meanings, one in conflict with the Constitution and the other not in conflict, the court ought to adopt the latter, especially when it appears that that was the meaning intended by the defendant. The following cases state the rule which should be followed in determining whether the resolution, if regarded as a law of the state, will be held to violate the constitutional guarantees.

"The rule of all courts is that a statute will be declared unconstitutional only when it is shown beyond reasonable doubt that it conflicts with the fundamental law. It is equally true that the courts will seek every reasonable mode of reconciliation of the statute with the constitution and it is only when reconciliation has been found impossible that it will be declared void."

State vs. Stevens, 112 Wis., 170;

quoted and approved in:

Wheeler vs. Herbert, 92 Pac. (Cal.) 353, 358.

In *Munn vs. Illinois*, 94 U. S., 113, Chief Justice Waite said, p. 123: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

In *C. & N. W. Ry. Co. vs. Dey*, 35 Fed. R., 866, Judge Brewer said, p. 874: "It is elemental that a law will not be declared unconstitutional unless the vice is obvious. As was said by Chief Justice Waite in the Munn case: 'Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.'" Or, as has been elsewhere epigrammatically said: 'A doubt sustained the law.'"

That the resolution complained of does not impair the obligation of complainant's contract.

1st. Because it was not enacted in the form or manner provided

by the statute of the state and is therefore void as a matter of state law, and is not a law of the state or an enactment to which the state has given the force of law.

2nd. Because it was an attempt to amend or repeal an ordinance by a resolution and is therefore void as a matter of state law and is not a law of the state or an enactment to which the state has given the force of law.

3rd. Because if the effect of the resolution would be to impair the obligation of contracts or to deny due process of law or equal protection of law, it is in contravention of the Constitution of Iowa and void as a matter of state law.

4th. Because the resolution was not a legislative act, but was passed for administration or executive purposes only.

FIRST. That the resolution complained of does not impair the obligation of complainant's contract because it was not enacted in the form or manner provided by the statutes of the state, and is, therefore, void as a matter of state law, and is not a law of the state or an enactment to which the state has given the force of law.

The provision of the constitution which it is claimed was infringed provides: Art. I, Sec. 10, "No state shall pass any law impairing the obligation of contracts."

It has been repeatedly decided by this court that to come within the constitutional inhibition there must be a law of the state or an enactment from some source authorized by law or to which the state gives the force of law.

Williams vs. Bruffy, 96 U. S., 176, 183;
Lehigh Water Co. vs. Easton, 121 U. S., 388, 392;
N. O. Water Co. vs. Louisiana Sugar Co., 125 U. S., 18, 31, 38.

In *N. O. Water Co. vs. Louisiana Sugar Co.*, 125 U. S., 18, it is held that the inhibition is aimed at the legislative power of the state and not at the decisions of its courts or the acts of its adminisrative or executive officers.

In *Iron Mountain R. Co. vs. Memphis*, 96 Fed., 113, 126, Judge Taft for the Circuit Court of Appeals, said: "If such ordinancee is ad-

ministrative rather than legislative, then it is not within the constitutional inhibition, even if it impairs the obligation of a contract."

Another rule announced in the decisions of this court is that although the city may have had authority to legislate upon the subject, if the attempt to legislate is void for want of conformity to the provisions of the state law, no Federal question arises under it, for it is not a law; thus in *Hamilton Gas Light Co. vs. Hamilton*, 146 U. S., 258, 266, the court said: "The jurisdiction of this court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by ordinance to which the state has not in any form given or attempted to give the force of law. A municipal ordinance not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against laws impairing the obligation of contracts: *Muncay vs. Charleston*, 96 U. S., 432, 440; *Williams vs. Bruffy*, 96 U. S., 176, 183; *Lehigh Water Co. vs. Easton*, 121 U. S., 388, 392; *N. O. Water Works vs. Louisana Sugar Co.*, 125 U. S., 18, 31, 38. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States."

And in *Shreveport vs. Cole*, 129 U. S., 36 it was held that where the action of a municipality was not authorized by the laws of the state, it was not within the prohibition of the contract clause of the Constitution.

It becomes necessary therefore to ascertain whether there is in this case, in the resolution complained of, a law of the state or an enactment authorized by law or to which the state has given the force of law.

The resolution complained of reads as follows, record p. 362, 363:

"WHEREAS, Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Co. to maintain their tracks and to operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines, and

"WHEREAS, It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible;

"Be It Resolved, By the City Council of the City of Des Moines, that said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all the streets along which they now are operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution."

"Be It Further Resolved, That should the said railway companies fail to commence such removal within the time above specified, the City Solicitor be and is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution."

"Be It Further Resolved, That the City Clerk be and is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and Interurban Railway Company forthwith."

The City of Des Moines is a municipal corporation and whatever legislative powers it has must be exercised by ordinance enacted as provided in Chapter 3 of Title V of the Code of Iowa, as follows:

Sec. 680. "Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

Sec. 681. "No ordinance shall contain more than one subject, which shall be clearly expressed in its title; and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed."

Sec. 682. "Ordinances of a general or permanent nature and those for the appropriation of money, shall be fully and distinctly read on

three different days, unless three-fourths of the council shall dispense with the rule."

Sec. 683. "No resolution or ordinance for any of the purposes hereinafter set forth shall be adopted without the concurrence of a majority of the whole number of members elected to the council, to-wit:

1. To pass or adopt any by-law or ordinance.

2. To pass or adopt any resolution or order to enter into a contract.

3. To pass or adopt any ordinance for the appropriation or payment of money; but in towns, by-laws, ordinances, and the resolutions and orders set forth in this section, shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded. No money shall be appropriated except by ordinance. In towns money may be appropriated by resolution."

Sec. 684. "No resolution or ordinance for any of the purposes hereinafter set forth, except as otherwise provided by law, shall be adopted without the concurrence of two-thirds of the whole number of the members elected by the council, to-wit:

1. Directing the opening, straightening or widening of any street, avenue, highway or alley.

2. Directing the making of any improvement which shall require proceedings to condemn private property.

3. Directing any improvement or repair of a street, avenue, highway or alley, the cost of which is to be assessed upon the property or against the owners thereof, unless two-thirds of the owners to be charged therefor shall petition in writing for the same.

On the passage of every such ordinance or resolution, the yeas and nays shall be called and recorded."

Sec. 685. "The mayor shall sign every ordinance or resolution passed by the council before the same shall be in force, and, if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter; and return the

same, with his reasons therefore. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution, with his reasons, as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative. Upon the return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, by not less than two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by two-thirds vote of the council, and sign it officially as clerk."

It is universally held to be the rule that corporate acts must not only be authorized by the charter, but must be done by such officers and agents and in such manner as the charter authorizes.

Bank of Augusta vs. Earle, 13 Peters, 517, 587;
Mayor vs. Ray, 19 Wallace, 468, 475;
2 Kent Com. 299.

Construing the statute quoted above, the Supreme Court of Iowa has held that the legislative power of the city must be exercised by ordinance and cannot be exercised by resolution. Thus, in *Martin vs. Oskaloosa*, 126 Iowa, 680-685, the Court said: "Under our statutory provisions it may perhaps be very properly said that the general authority to provide how a power conferred by the legislature shall be exercised should be by ordinance rather than by resolution. (See Code, sections 680-684.) *Shelby vs. Burlington*, 125 Iowa, 343."

In *McManus vs. Hornaday*, 99 Iowa, 508-10, where a statute in almost the same language of Section 680 was under consideration, it was held that the power to establish the grade of a street must be exercised by ordinance.

Where the power exercised is of a general or permanent nature, it must be exercised by ordinance and cannot be exercised by resolution, and an ordinance cannot be revised or amended by resolution.

Cascaden vs. Waterloo, 106 Iowa, 673, 678, 681;
Eckert vs. Walnut, 117 Iowa, 629;
Zalesky vs. Cedar Rapids, 118 Iowa, 714.

In the opinion of the lower court it is said, Record p. 41: "That

a council can authorize the occupancy of its streets by resolution as well as by ordinance has been held by the Iowa Supreme Court. *Merchants Company vs. Railway*, 70 Iowa, 105; *Street Railway vs. City of Des Moines*, 73 Iowa, 513, 522;" and, Record p. 42: "All agree that when the statute requires an ordinance, that a resolution will not do, and that only is what many of the cases cited hold."

The cases cited construed Sec. 464, Code 1873, now re-enacted as Code Sec. 767: "Cities and towns shall have power to authorize or forbid the construction of street railways within their limits and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places," and the case in 73rd Iowa is decided upon authority of the case in 70th Iowa. If the resolution in the case at bar is a law of the state within the provisions of the contract clause of the Federal Constitution it is because it is a proper exercise of the powers conferred by Sec. 767 of the Code. Section 767 is in the same title, viz.: Title V in which are found Sections 641 and 680 construed in *Cascaden vs. Waterloo*, 106 Iowa, 673. It will be noted that in Section 767 there is no express provision as to how the power shall be exercised, whether by resolution or ordinance. In the Cascaden case the court after referring to the fact that in some sections in Title V the statute provides that the powers thus provided for shall be by ordinance, that the powers in other sections may be exercised by resolution and those in other sections by ordinance or resolution finally holds that where the section conferring the power does not provide for the manner of its exercise the power, if legislative in character, must be exercised by ordinance and on page 680, 681 the court reverses and overrules *Merchants Co. vs. Railway Co.*, 70 Iowa, 106, relied on by the Circuit Court mainly upon the ground that the statutes have been changed since that case was decided.

It follows therefore that the city could not legislate or pass an enactment by resolution which would be a law, or to which the state did or would give the force of law, and that the resolution was not, therefore, a law impairing the obligation of complainant's contract.

If, therefore, the resolution was intended to have the effect claimed by complainant it was ineffectual and void as a matter of state law,

and under the doctrine of the cases above cited there was no Federal question, and the United States Circuit Court was without jurisdiction.

SECOND: That the resolution complained of does not impair the obligation of complainant's contract, because it was an attempt to amend or repeal an ordinance by a resolution, and is, therefore, void as a matter of state law, and is not a law of the state or an enactment to which the state has given the force of law.

In the last above subdivision of this argument we have shown that to come within the constitutional inhibition against laws impairing the obligation of contracts there must be a law of the state or an enactment from some source authorized by law or to which the state gives the force of law.

Williams vs. Bruffy, 96 U. S., 176, 183;
Lehigh Water Co. vs. Easton, 121 U. S., 388, 392;
N. O. Water Co. vs. Louisana Sugar Co., 125 U. S., 18, 31, 38;
Iron Mountain R. Co. vs. Memphis, 96 Fed. 113, 126.

We have also shown that where the enactment complained of is void for want of conformity to the provisions of the state law no Federal question arises under it, for it is not a law.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258, 266;
Shreveport vs. Cole, 129 U. S., 36.

In the case at bar, whatever contracts complainant has were made by ordinances passed by the City Council of the City of Des Moines and by certain suburban towns which have been annexed to and merged in the city. (See allegation of the bill, Record p. 1-18.) The enactment complained of is a resolution adopted by the City Council, (Record p. 362-363) and if it can be construed as a law impairing the obligation of those contracts it is because it is an attempt to cancel, repeal or modify the ordinances in question.

When the franchises which are claimed to constitute contracts were granted the city had power to authorize or forbid the location and laying down of street railways tracks. (Code of Iowa, Sec. 767.) It may be that under the doctrine of some of the cases the city could exercise this power either by resolution or by ordinance, but in granting both the Turner Narrow Guage franchise, (Record p. 18) and the

Broad Guage Franchise, (Record p. 138) the city did so by ordinance. In *Cascaden vs. Waterloo*, 106 Iowa, 673, 682, the Supreme Court of Iowa held that an ordinance cannot be amended, repealed or modified by resolution and said: "We conclude that ordinances of a general or permanent nature cannot be amended, repealed or suspended by resolution, but by ordinance only."

If, therefore, the resolution was intended to have the effect claimed by complainant it is void as a matter of state law and under the doctrine of the cases cited above no Federal question arises in respect thereto, and the United States Circuit Court was without jurisdiction to try and determine this cause.

THIRD: That the resolution complained of does not impair the obligation of any contract or deny to complainant due process of law or the equal protection of the law, because if so intended it is in contravention of the Constitution of Iowa and void as a matter of state law.

As we have already shown in this argument, the matters complained of do not come within the inhibition of the Constitution of the United States, unless there is a law of the state or an enactment from some source authorized by law or to which the state gives the force of law.

We have also seen that where the enactment complained of is void for want of conformity to the provisions of the state law or because in contravention of state law, it is not a law, and no Federal question arises under it.

> *Hamilton Gas Light Co. vs. Hamilton*, 146 U. S., 258, 266;
> *Shreveport vs. Cole*, 129 U. S., 36.

The Iowa Constitution provides:

Art. I, Sec. 21. "No * * * law impairing the obligation of contracts shall ever be passed."

Art. I, Sec. 6. "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges which upon the same terms shall not equally belong to all citizens."

Art. I, Sec. 9. "* * * No person shall be deprived of life, liberty, or property without due process of law."

In these provisions the Constitution of Iowa therefore secures to complainant the same guarantees against impairment of its contract, and against denial of due process of law and the equal protection of the law that are secured under Art. I, Sec. 10, and Sec. 14 of the Amendment to the Constitution of the United States. If, therefore, the resolution can be construed to be a legislative act, and to impair the obligation of complainant's contracts, it is prohibited by the State Constitution and void as a matter of state law; if the resolution and the acts complained of do or will deprive complainant of its property without due process of law, or deny the equal protection of the law, they contravene the Iowa Constitution, and are prohibited and void as a matter of state law.

If, therefore, the resolution and proceedings had or have the effect claimed by complainant, they are void under the laws of the state; there is no enactment to which the state has given the force of law for the purpose of impairing the obligation of a contract, or denying complainant due process of law or the equal protection of the law. No Federal question arises upon the matters complained of, and the United States Circuit Court was without jurisdiction.

FOURTH: That the resolution complained of does not impair the obligation of any contract, or deny to complainant due process of law, or the equal protection of the law, because the resolution was not a legislative act but was passed for administrative or executive purposes only.

In *New Orleans Water Co. vs. Louisana Sugar Co.*, 125 U. S., 18, 31, 38, it was held that the prohibition in the constitution is aimed at the legislative power of the state, and not at the decisions of its courts or the acts of its administrative or executive boards.

And in *Iron Mountain R. Co. vs. Memphis*, 96 Fed. R., 113, 126, the court said: "If such ordinance is administrative rather than legislative, then it is not within the constitutional inhibition even though it impairs the obligaton of a contract. *N. O. Water Co. vs. La. Sugar Co.*, 125 U. S., 18."

The record in this case shows that the resolution was not legislative, but an administrative or executive act only, intended to instruct the solicitor as the law officer of the city, and authorizes him to bring and prosecute an action. The resolution as set out in the bill (Record p. 15) shows that its purpose was not to change the rights and relations of the parties, but to secure a determination thereof, and the evidence shows that the only purpose was to give the solicitor authority to institute proceedings in court to determine what are the rights of the company.

See testimony of W. H. Bremner and exhibits therewith, Record p. 359, 366.

The form of the resolution and its purposes were similar to the resolution considered in:

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.

In that case the facts were substantially as follows: The charter of the St. Paul Gas Light Co. was granted in 1856 and expired in 1907. It was provided in the charter that whenever the Board of Aldermen of the City of St. Paul should so direct, lamps were to be erected and lighted in the streets of the city, and further provided for the price to be paid by the city for the use thereof. Under this provision the St. Paul Gas Light Company had installed 3362 lights up to January 1, 1897. Shortly thereafter the city, having commenced the use of electricity for lighting purposes, passed the following resolution:

"*Resolved*: That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the Board of Public Works."

The resolution further provided that from and after the passage of the resolution, no interest be paid to the said St. Paul Gas Light Company on account of the purchase and equipment of said gas street lamp posts. It is claimed on the part of the company that the passage of this resolution was the passage of a law impairing the obligation of the contract embodied in the charter; and upon this question the Supreme Court, Mr. Justice White, delivering the opinion, says: "Referring to the ordinance in question, from the provisions of which

it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to; the first, a command by the city to the gas company to 'forwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;' and second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. * * * Now it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. * * * The other provisions in question created no new right or imposed no new duty substantially antagonistic to the obligation of the contract, but simply expressed the purpose of the city, not in the future to pay. * * * That is to say, it was but a denial by the city of its obligation to pay and a notice of its purpose to challenge in the future the existence of the duty to make such payment. * * * As it is apparent from the foregoing consideration that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this Court."

Neither the resolution complained of, nor the acts done, or contemplated by the city, deprive complainant of its property without due process of law, or deny the equal protection of the law.

The bill charges the passage of the resolution, (Record p. 15) but it is nowhere alleged that the city or its officers have done anything under the resolution or intended to do anything except what is directed in the resolution, viz.: "That the city solicitor be and is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution." The

bill recites what would be the effect of tearing up or obstructing tracks, but does not charge that there has been any physical interference, or that any is contemplated or threatened.

The powers and duties of the city solicitor of Des Moines, are defined in Section 35 of the Revised Ordinance of 1900,(Record page 399) as follows:

"The solicitor shall have and exercise all of the powers and perform all the duties provided or prescribed by law or the Ordinances of the City. It shall also be his duty to prosecute or defend all suits to which the city is a party in all the courts of the city, state and United States, to prosecute all suits for violation of any city ordinance, and all criminal prosecutions before the police court. He shall when requested or whenever in his opinion it is necessary advise the city council and the officers of the city upon all legal questions relative to the business of the city or matters in which the city is interested, which advice shall whenever practicable be given in writing. He shall draw all contracts to which the city is a party. He shall examine and report in writing to the city council upon all ordinances prior to their final passage by the city council."

In the absence of a provision in the resolution of November 21, 1908, prescribing the manner in which he is to act, it must be presumed that it was the intention of the council that he should act only within the limits of the powers he possessed under the general ordinance of the city.

The answer denies that it is the intention of the city to tear up tracks or interpose any physical obstruction or interference with the street railway or the operation thereof, and states, Record p. 27:

Par. 27. "That this defendant denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff herein, unless it shall be declared by some court of competent jurisdiction that the plaintiff has no right to maintain or operate said system. That it was the intention of the City of Des Moines in the passage of the resolution heretofore referred to, to simply lay a foundation for the commencement of an action for the purpose of testing the rights of the plaintiff to so maintain and operate its said railway system, and further states that it is the intention of the said city to commence an action in equity in the District Court of the State of Iowa, in and for Polk County, it being

a court of competent jurisdiction, for the purpose of testing such rights, and that the City of Des Moines has no intention to do otherwise than this, and does not now threaten and never has threatened to interfere with the plaintiff by force, or to attempt to take away or forfeit any rights, privileges or franchises which the plaintiff herein claims to have, except under and by due process of law."

"Par. 28. That it is not now and never has been the intention of the City of Des Moines to take from or attempt to take from the plaintiff herein any rights which it may have under and by virtue of the ordinances referred to in the bill of complaint; but that the City of Des Moines is simply seeking to have the rights of the plaintiff fully determined by a court of competent jurisdiction to the end that the plaintiff herein may not exercise rights and privileges of which it is not the possessor. That the City of Des Moines is simply seeking to protect and preserve its own rights and the rights of the public by resorting to a court of competent jurisdiction."

It would be the duty of the solicitor to bring and prosecute proceedings in court and nothing more was or could be meant by the words of the resolution, "to take such action as he shall deem advisable or necessary to secure the enforcement of the above resolution."

It is universally held that the prohibition in Art. XIV of the Amendments to the Constitution, against deprivation of property without due process of law is intended to protect property from confiscation by legislative enactments, from seizure, forfeiture and destruction without a trial and conviction by the ordinary modes of judicial proceeding.

10 Am. & Eng. Ency. of Law, p. 292, note 2; p. 293, note 2: "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice." *2 Kent Commentary*, 13.

It is said in *Caldwell vs. Texas*, 137 U. S., 692, 697 and *Leeper vs. Texas*, 139 U. S., 462, 468, that: "Law in its regular course of administration through courts of justice is due process and when secured by the law of the state, the constitutional requirement is satisfied."

Neither in the allegations in the bill nor in complainant's evidence, is there one fact, as distinguished from a mere assertion of a conclusion, from which it appears that there has been or will be any denial of due process of law, while from the answer and the defendant's evidence it appears affirmatively that there is and will be

no deprivation of property or of rights of property claimed, except through ordinary proceedings in courts of competent jurisdiction. The record does not show any infringement of the guarantees in the Fourteenth Amendment, and there is no Federal question in the case.

A recent case upon this subject is *Tracy vs. Ginsberg*, 205 U. S., 170, 177, in which it was held that the denial of the claim of a party to property or property rights by the judgment of a court in the orderly and regular course of procedure, is not a deprivation of propety without due process of law within the meaning of the Constitution. In the opinion it is said: "The Fourteenth Amendment did not impair the authority of the states by their judicial tribunals and according to their settled usages and established modes of proceedure to determine finally for the parties before it, controverted questions as to the ownership of property which did not involve any right secured by the Federal Constitution or by any valid act of Congress or by any treaty."

II.

EQUITABLE JURISDICTION.

That complainant is not entitled to an injunction or to any equitable relief.

1. That the resolution having been adopted at the instance and request of complainant it is not entitled to an injunction to restrain the operation thereof.

2. That the allegations in the bill having been denied in the answer and not being sustained by the evidence, complainant is not entitled to an injunction.

3. That complainant is not entitled to an injunction to prevent the bringing and prosecution of actions in courts of competent jurisdiction.

FIRST: That complainant is not entitled to an injunction or to any equitable relief because the resolution complained of was adopted at the instance and request of complainant.

The Railway Company asks that an injunction be granted to restrain the city from proceeding under a resolution passed by the coun-

cil on November 21, 1905, which after reciting that there were controversies between the company and the city which ought to be speedily determined, ordered the company to remove its tracks from the streets within twenty-five days and provided: "That should said railway company fail to commence such removal within the time above specified the city solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution."

The history of the resolution and of the acts which preceded its passage is fully related in the testimony of W. H. Bremner, city solicitor. (Record p. 359 to 368.) Briefly stated the facts were as follows: Robert Fullerton and others as relators had brought an action in the nature of quo warranto in the name of the State of Iowa against the Railway Company to test its right to the franchise which it claimed to have. A motion to dismiss was filed and thereupon the relators filed with the council a written petition requesting that the city join in the litigation. The matter was referred to the solicitor who reported recommending that the city join in the litigation to test the rights of the company either by joining in the pending action or by an independent suit. Thereupon an attorney for the company gave to one of the council, with the request that it be introduced and passed, a resolution the same as that finally adopted except that for the evident purpose of bringing it within the case of *Iron Mountain R. Co. vs. Memphis*, 96 Fed. R., 113, the resolution directed the board of public works to tear up the tracks if the company failed to obey the order to remove them. The proposed resolution coming to the attention of the solicitor, he changed it to the form in which it was passed with the purpose of making it merely a direction to the solicitor to bring and prosecute proceedings in court. During the time the resolution was in the hands of the solicitor the attorney for the Railway Company called on him to inquire what were his objections to the proposed resolution. In these and other ways it is made evident that the Railway Company was active in securing the passage of the resolution of which it now complains. The testimony of Mr. Bremner upon this matter stands without any attempt on the part of the company to either contradict or explain the claim that it was active in securing the passage of the

resolution and that it was passed at the instance and request of the company.

It needs no citation of authorities to sustain the proposition for which we contend, namely, that the complainant is not entitled to an injunction to restrain the city from carrying out the resolution which the company procured to be passed.

SECOND: That complainant is not entitled to an injunction or to any equitable relief because the allegations in the bill are denied in the answer and are not sustained by the evidence.

The relief sought by the bill is an injunction to restrain the city and its officers from proceeding to enforce the resolution and from obstructing or interfering with the free use of the street railway tracks and other property and rights. In the answer (Record p. 27, par. 27 and 28) the city denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff, unless it shall be declared by some court of competent jurisdiction that plaintiff has no right to maintain or operate said system, and alleges that all that was or had been done or intended was to bring and prosecute proceedings in courts of competent jurisdiction to determine the rights of the respective parties. The company offered no evidence to show that the city had done or intended to do anything whatever under the resolution complained of or had done or threatened or intended to do anything which would obstruct or interfere with the tracks or other property of the company or the free use thereof while the evidence for the city shows that not only was not physical interference with the company or its property intended or proposed, but that all that was intended or proposed was to bring and prosecute proceedings in courts of competent jurisdiction to ascertain and settle the respective rights of the parties. *Testimony of W. H. Bremner*, Record p. 365, 366.

THIRD: That the company is not entitled to an injunction or to any equitable relief because the only act intended or contemplated is the bringing and prosecuting in courts of competent jurisdiction of proceedings to determine the rights of the parties.

In the bill, complainant recites what would be the consequences of tearing up the tracks or a physical interference with the operation of

its road but it is not alleged that anything of the kind had been done or was intended. Complainant offered no evidence to show what had been done or was threatened or intended to be done by the city or its officers and especially did not offer any evidence of any act done or contemplated which would interfere with the tracks or property of the company or the use thereof. In the answer (Record p. 27 and 28) the city alleged that all that it had done or intended to do was to bring and prosecute proceedings in courts of competent jurisdiction to ascertain and have determined the respective rights of the parties and denied anything else had been done or was threatened or intended to be done. The evidence offered by defendant, testimony of W. H. Bremner (Record p. 365-366) shows that all that had been done or was threatened or intended to be done by the city or its officers, was to bring and prosecute in courts of competent jurisdiction proceedings to ascertain and determine the respective rights of the company and the city. That in addition to the action in the nature of quo warranto brought in the State District Court in the name of the State of Iowa by Robert Fullerton and others and to which the city is made a party the city has pursuant to the resolution complained of, brought a suit in equity in the State District Court and that both of said proceedings are pending.

The facts, therefore, do not present a case in which the complainant is entitled to an injunction or to any relief in a court of equity.

In High on Injunctions, Sec. 64, the rule is stated thus: "It is to be observed that mere apprehension or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such action. * * Nor will the court enjoin threatened prosecutions at law upon the ground of the unconstitutionality of an act of the legislature under which the prosecutions are to be brought since such alleged unconstitutionality cannot of itself be made a ground for equitable jurisdiction."

In *Wolfe vs. Burke*, 56 N. Y., 115, 119, the court said: "The danger of judicial proceedings is not an injury justifying an injunction. *McGuire vs. Palmer*, 5 Robt., 607."

And in *Wallack vs. Society*, 67 N. Y., 23, 28, it was said: "The

general rule is that the court will not restrain a prosecution at law where the question is the same at law and in equity. *Wolfe vs. Burke*, 56 N. Y., 118. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such a case by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action."

In *Cape May vs. Cape May D. B. & S. F. R. Co.*, 60 N. J., Law 224, the railway company had extended its tracks on a street under claim of right; the city council adopted a resolution which after reciting that the track was laid without authority and was an obstruction to public travel provided: "Resolved that the company be notified and requested to remove said extension at once and if they shall refuse to comply with such notice and request that said committee shall be empowered and directed to employ counsel and take legal measures on behalf of the city to enforce the same." In a suit brought by the company the lower court set aside the resolution and upon appeal this action was reversed. The court said: "We do not, however, concur with the judgment of the Supreme Court in setting aside the resolution. It only provides that the street committee shall notify and request the railway company to at once remove the extension of its track and instructs them in case of refusal to comply with such notice, to employ counsel and take legal measures to enforce its removal. We think it was clearly within the power of the council to pass such a resolution. It did not of itself affect any property right of the railroad company and therefore no notice was required to be given before passing it. By its terms it was only a notice and request. No summary or arbitrary action was advised or suggested, but rather the contrary; for the committee is directed to employ counsel and take legal measures to accomplish the object proposed. It is always lawful to employ counsel and take legal measures to remedy a real or supposed grievance, whether public or private, and we think the instructions to the committee were unobjectionable." The resolution in the Cape May case was not in legal effect different from that complained of in the case at bar and that case is an authority denying jurisdiction in this case to interfere with or restrain the proceedings authorized by the resolution.

Of the jurisdiction of a court of equity, Judge Swan in *Detroit vs. Detroit City Ry. Co.*, 56 Fed. R., 867, said (page 898): "It is a familiar maxim of equity jurisprudence that 'nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence.' Another maxim is that 'he who seeks equity must do or offer to do equity.' The relief prayed calls for the exercise of one of the highest powers of a court of equity, aptly termed in *Irwin vs. Dixon*, 9 How. 33: 'The extraordinary or transcendent power of injunction, and is, therefore, to be used sparingly and only in a clear and plain case,' and of which it is well said in *Bonaparte vs. R. Railroad*, Baldw., 217, 218 (1617 Fed. Cas. 821-827): 'There is no power the exercise of which is more delicate, requires greater caution, deliberation and sound discretion, or more dangerous, in a doubtful case. * * * It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, when courts of law cannot confer an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protective, preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well established principles, for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress; it being the act of a court, not of a party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured or great and lasting injury about to be done, by an illegal act.'"

III.

Municipalities in Iowa have not the Power to Grant to a Street Railway the Right to Occupy Streets in Perpetuity.

Cities have no inherent jurisdiction to make laws or adopt regulations of government. They are governments of enumerated powers, acting by delegated authority.

In the case of *Clark vs. City of Des Moines*, 19 Iowa, 199, decided in 1865, the question involved was as to whether or not the City of Des Moines had power to issue negotiable bonds which in the hands of a bona fide holder would be free from defenses to be made by the city.

In reference thereto the Court, on page 212 of the opinion, speaking through Dillon, Justice, said:

"It is a familiar and elemental principle that municipal corporations have and can exercise such powers and such powers only as are expressly granted, and such incidental ones as are necessary to make those powers (expressly granted) available and essential to effectuate the purposes of the corporation and these powers are strictly construed."

In the case of the *City of Keokuk vs. Scroggs*, 30 Iowa, 447, the question involved was as to whether or not the city council had the power to compel the owner of a lumber yard to remove the same from the territory included in the fire limit. The charter of the city provided:

"The city council shall have power to make and publish all ordinances that shall be necessary to secure said city * * * against injuries by fire * * * They shall have power * * * to make and publish all laws and ordinances as to them may be deemed necessary to provide for the safety, * * * order, comfort and convenience of said city, and the inhabitants thereof; to impose fines and penalties on all persons offending against the laws and ordinances of said city, * * * the city council, for the purpose of guarding against the calamities of fire shall have power to prescribe the limits within which wooden buildings shall be erected, or placed or repaired, and to direct that all or any buildings within the limits prescribed shall be made or constructed of fire proof material, and to prohibit the repairing or rebuilding of wooden buildings within the fire limits when the same shall have been damaged to an extent of fifty per cent."

The court said, on page 450:

"Cities have no inherent jurisdiction to make laws or adopt regulations of government. They are governments of enumerated powers, acting by delegated authority. The state legislature may exercise such power of government coming within a proper designation of legislative power as the Constitution does not expressly or impliedly prohibit; but cities can exercise those powers only which are expressly or impliedly conferred, and these must be exercised subject to such restrictions and regulations as the grant imposes. The charter or general law under which they exercise their power is their constitution, and from it they must show authority for the acts they perform.

"Municipal corporations can exercise such powers only as are expressly granted, and such implied ones as are necessary to make available the powers expressly conferred and essential to effectuate the purpose of the corporation, and these powers are strictly construed."

In the case of *Brockman vs. City of Creston*, 79 Iowa, 587-9, the plaintiff sought to enjoin the defendant from conveying to the county in which the defendant was located certain lots and buildings thereon, which the city had agreed to donate to the county if it would remove the county seat from Afton to Creston and in holding that the defendant had not the power to make such a gift, the court, on page 589, says:

"It is a familiar rule of law that cities and other municipal corporations can exercise only such authority as is expressly granted by their charters or legislative acts creating them, or necessarily implied in such grant, or incidental thereto; and reasonable doubts as to the existence of authority in such corporations are always to be resolved against it."

As applied to the specific question involved, the court says:

"No statute of this state grants cities the authority to dispose of or convey their property except for purposes contemplated by law. They have power to dispose of their real property for purposes authorized by law and for no other purpose. The purpose of the disposition of the land determines the question of authority. * * * The city holds its property for the uses and benefits of the people. It is, as it were, a trustee for its citizens, and must use the property it holds for purposes sanctioned by law. There is no statute authorizing a city to erect buildings for the county, or to give it a house and lands to induce the re-location of the county seat."

A municipality has no inherent power and without authority granting such power cannot authorize a street railway company to lay down tracks on its streets and operate cars over the same.

Judge Dillon, in his work on Municipal Corporations, Section 716, commending the judgment of the Supreme Court of New York in the case of *Davis vs. New York*, which involved the power of the city without legislative authority to authorize the construction and operation of a street railway, said:

"The powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private parties, either corporate or natural. In this case, there was no such authority, and hence the resolution of the council, authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract, void, however, because if valid it would deprive the corporation of the control and regulation of its streets."

In Section 717, he says:

"In Great Britain, legislative authority or sanction is necessary to enable a town or others to occupy the streets or highways for the purpose of a horse or street railway, and such is doubtless the law in this country."

In the case of *Milhau vs. Sharp*, 27 N. Y., 611-619-622, the question was as to whether the common council of the city had authority to grant the right to construct and maintain a railway through Broadway. The court said:

"The granting of franchises was a part of the prerogative of the British crown, which, on the severance of the colonies from Great Britain, became vested in the people; and no franchise can be created in this state without authority to create it derived from the people through the legislature. * * * The corporation nor the common council has been authorized to create a franchise of the character of that described in the resolution under consideration. It follows that the resolution relating to a subject not within the powers of the body passing it, is merely void."

In the case of *Gozin vs. Ghicago*, 132 Fed., 848, 854, (C. C. A.) the complainant claimed the right to construct and operate a street railway, basing such claim on the power of the city inherently to grant said right. The court said, Judge Grosscup delivering the opinion:

"At first it was thought that under this general power over streets, the municipality, in whose streets street railways were to be laid, might have power to authorize the construction and operation of such roads, but this view was quickly dissipated by the courts. With unanimity, the courts decided that the legislatures of states, alone, possessed such power; that the municipality had no such power; and that the power could be exercised by the legislature without the consent of the municipality, or even a reference to its wishes."

The streets and highways are under the exclusive control of the General Assembly.

In the case of *Stanley vs. City of Davenport*, the question involved was the authority of the City of Davenport to authorize the use of a steam motor on its streets, where its charter nor the ordinances prohibited the street railway company from using other than animal power in the operation of its road, nor did the charter or ordinance contain a grant to that effect. The court said:

"Streets and highways are under the exclusive control of the general assembly. It matters not if the fee of the streets is in the city. It has

no authority to control or grant rights and privileges thereto or thereon unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the state. The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it, or authorize the streets to be used for private purposes; nor can it, without legislative authority, grant the use of a street for public purposes which renders it dangerous for the public to travel over it in any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the state."

In the case of *Dickinson County vs. Faus*, 112 Iowa, 21-3, which involved the question of the right to maintain a public highway, the court said:

"By special provisions of the Code, boards of supervisors have power to establish, maintain and discontinue highways; and for the purpose of keeping them in repair, certain authority is given to township officials. Nevertheless, these powers are attributes of sovereignty. For convenience, they are delegated; but nothing goes with them not expressed or necessary to the performance of the duties named. Were it not for the statutes mentioned, the power to lay out, discontinue and improve highways would be in the state, which is the representative of the general public. It follows, therefore, that, when such an easement is created, the ownership thereof, if we may use the expression, is in the state. Even where the fee of a street is in the city, we have said such street, so far, at least, as concerns the right to permit its use by other than ordinary travel, is under the exclusive control of the general assembly."

A municipality, under its charter powers to lay off, open, widen, straighten, or to narrow or vacate, or to extend, improve or keep in order and repair streets, does not have the power to authorize the construction of a street railway thereon.

In the case of *Davis vs. Mayor, etc.*, 14 N. Y., 514-17, which was a case involving the power of the common council of the City of New York to grant the right to use its streets by a street railway, and is the first case on the subject in this country, the court said:

"The power of the corporation (City of New York) over this subject is necessarily very large. It may lay out, open, altar, repair and amend and regulate streets, lanes, alleys and highways, and may direct the drainage, pitching and paving of them. * * * and may discontinue and close up streets in the manner specified in the act. But

this power relates to and is confined to streets, lanes, etc., as such. Everything which is fairly within the idea of regulating, altering, repairing or amending the streets, with a view to their uses and purposes as streets, may be exercised by the corporation, but the converting of a street or a part of a street into a new piece of machinery for transporting persons with which the existence of a street has no natural or necessary connection, is not, in my judgment, at all within the purview of the charter and acts of the legislature to which I have referred. If an existing street can be converted into a railway, I see no reason why the corporation cannot authorize the laying out of a railroad where at present no street exists. They have as ample power to lay out and establish streets as to altar and amend them; and if they can consider a railway as falling within the legal notion of a street, the power extends as well to the laying out of new railroads as to changing the present streets into railroads. * * *

"The foregoing considerations have led me to the conclusion that the resolution of the common council, granting to the defendant Sharp and others the right to lay down a railroad in Broadway, was without the scope of the powers of the corporation, and was wholly unauthorized and illegal.

"But I think it was illegal for another reason. * * * The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The corporation of New York may without doubt, make grants of this character respecting the public waters which surround the city, but independently of that power, which is in terms conferred by the charters, they have no more authority to make such a grant than any other administrative board in the state. If they could make this grant, they could charter, upon the city streets, a turnpike or plank road company. They could grant to individuals the right to pave or otherwise improve the streets, and to impose tolls thereon to be exacted from all who should travel upon them. * * * The board has no power to grant to any person a franchise for transporting passengers on the public streets, for profit, for a single day, and the attempt to do so was absolutely void."

In the case of *Stanley vs. City of Davenport*, 54 Iowa, 463-7-8, which was an action in which one of the questions involved was the power of the city to authorize the location of a street railway and use a steam motor thereon, the defendant city was organized under a special charter, and the court said:

"The charter empowers the defendant to open, altar, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair streets, avenues and alleys. That the requisite power is not contained in the charter we regard as beyond serious controversy. * * * It may be that cities organized under the general incorporation law

have such authority; if so, it is because there is a statute to that effect. Code, Section 464.

"The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it or authorize the streets to be used for private purposes. Nor can it without legislative authority grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the state."

In the case of the *Peoples Railroad Co. vs. Memphis Railroad Co.*, 10 Wall., 38, which was an action involving the power of the city council to grant the right to construct a street railway over the streets of the city for twenty-five years, the corporation was vested with the power to lay out, open, altar, repair and amend streets, and also "to grant privileges in the use and enjoyment of the streets of the municipality," the court said:

"It would be a forced construction to hold that the power to grant such a franchise for street railway purposes for twenty-five years is included in that provision. Such corporations are usually invested with the power to lay off, open, alter, repair and amend streets within the corporate limits; but the rule is well settled, that by virtue of those powers without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void."

At the time of the granting of the franchise of December 10, 1866, the only power granted to and vested in the municipality of the City of Des Moines in reference to the streets, alleys and public places therein was:

"To lay off, open, widen, straighten, or to narrow and vacate or to extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, etc." (Section 1064 of the Revision of 1860.)

From this grant of authority it will be seen the City of Des Moines was not clothed with the power to make the grant contained in the ordinance of December 10, 1866, even to the extent of permitting the grantee in the ordinance to use the streets, alleys and public places of the City of Des Moines for street railway purposes. The right to make such grant of power must be found in the statute clothing the munici-

pality with the right to make such grant, or notwithstanding the making of it, the grantee would receive nothing. If the grant of power had been sufficiently broad to give the city the right to prescribe, control and regulate the manner in which the streets, alleys and public places should be used and enjoyed, this would probably have been sufficient authority to permit the grant of the right to use the streets, alleys and public places for street railway purposes for a reasonable time, and upon reasonable terms, but the grant contained in the statute was not not so broad and did not give the city the right to determine or regulate the manner in which the streets, alleys and public places should be used and enjoyed. By enactment of the Code of 1873, Iowa, Section 464, now Section 767 of the Code of 1897, further legislation was enacted. This section provides:

"Cities and towns shall have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places, etc."

It was after the enactment of this provision that the Supreme Court of Iowa, in the case of *Des Moines Street Railroad Company vs. the Des Moines Broad Guage Street Railway Company*, 73 Iowa, 513-517, recognized the fact that there had not been any legislation granting to the city the power to enact the ordinance of December 10, 1866, but calls attention to the fact that Section 464 of the Code of 1873, had been enacted since said date, and that by reason of such enactment the city had the authority to authorize or forbid the laying down of tracks for railway and street railways, and that by reason of the fact that in 1874 the City of Des Moines adopted a revision of its ordinances and included therein the ordinance of 1866, the city council of the City of Des Moines had ratified the ordinance of 1866, and that the contract expressed in such ordinance was in force. The court, however, did not pass upon the question of the duration of the franchise or contract, nor was the question of the duration or term of the franchise involved.

Code Section 464 gave the city the power to enact an ordinance granting the use of its streets, alleys and public places for street railway purposes, but did not grant it the power to pass such an ordinance or make such a contract for an unlimited time or in perpetuity.

A municipality cannot grant an exclusive or perpetual right to lay down and operate street railways over its streets, alleys and publia

places unless it is authorized and empowered so to do by the legislature by a grant in specific and explicit terms.

Mere authority "to authorize or forbid the use of its streets by street railways is not sufficient, and nothing short of the grant of power to authorize the use of its streets by street railways for an unlimited time, or in perpetuity, would be sufficient. It cannot be fairly claimed that the authority to authorize or forbid the use of its streets by a street railway company would carry the right to such use for more than a reasonable length of time, nor can it fairly be claimed that the implication would arise or that it would be necessarily implied that an unlimited term or perpetual right would be necessary or incidental to the operation of a street railway upon the streets, alleys and public places of the city. The whole history of franchises in this country is to the contrary, the rule being that the term of the grant is limited as to time in the case of street railways in every city of importance in the land.

In the case of *Nash vs. Lowery*, 37 Minn., 263; 33 N. W., 787-8, the City Council of the City of St. Paul had passed an ordinance granting in terms to certain persons named, or to their heirs or successors in interest, the consent of the Council to lay a line of railway with single or double tracks, with necessary and convenient turnouts, etc., in any or all of the streets of said city, the cars thereon to be propelled by none other than animal power. The parties named organized and assumed to and did act as a corporation and took over and exercised the rights specified in the ordinance. The company mortgaged its franchises and other property. Afterwards the property was sold under this mortgage, and another company took the same over, and the common council passed an ordinance which, in terms, granted and confirmed and continued to and in the St. Paul City Railway Co., the rights, privileges and franchises granted and specified in said former ordinance. The legislature confirmed and validated this ordinance. Before anything was done toward laying the tracks on certain streets, the common council passed an ordinance repealing the ordinances granted. The court said:

"It is immaterial to this question that said company is or is not a corporation.. * * * And also, * * * the grant by the ordinance is in the nature of a contract, and if valid as to the city, the common

council could not rescind it. The ordinance when passed was invalid as an irrevocable contract, for it is undoubtedly the rule, in accordance with both principle and authority, that a municipal corporation, entrusted with power or control over public streets, cannot, by contract or otherwise, irrevocably surrender any part of such power without the *explicit* consent of the legislature, because such power is in the nature of a trust held by the corporation for the state."

In the case of *Long vs. City of Duluth*, 51 N. W., 913-4, (Minn.), the village of Duluth was authorized to provide for and control the erection of water works in said village for the supply of water, and to grant the right to one or more private companies, and to authorize such company or corporation to lay water pipes and mains into and through the streets of the city of Duluth. The village passed an ordinance granting such right to the water company for thirty years. The village on its part agreed to abstain for that period from granting to any other party the right or privilege to lay water pipes in the streets or public grounds, and agreed likewise to abstain from building such water works. The question involved was as to whether or not the city had disabled itself from building water works of its own. The court said:

"In simple form, the question is whether the village had the power to grant an exclusive franchise, and thus to disable itself: The adjudications upon the subject show it to be no longer a matter of doubt that the legislature, acting presumably for the public good and with due regard for the future as well as the present interests of the state, may grant exclusive franchises like that which are claimed to have been bestowed upon this water company; and when that has been done, and the grant accepted and acted upon, it becomes a contract by which the state is effectually bound, and its future governmental powers are thereby impaired. It may be admitted, too, that the legislature may delegate to a municipal corporation the authority by contract to confer such exclusive privileges concerning matters properly pertaining to municipal affairs; but it is a well-settled principle of construction, applicable both to direct legislative grants and to those indirectly made through the action of municipal corporations, that exclusive rights of this nature are not conferred, and a statute which thus has the effect to impair the power of the legislature for future action should be construed most strongly in favor of the state. If there is any ambiguity or reasonable doubt arising from the terms used by the legislative or granting body, as to whether the exclusive franchise is being conferred or *authorized* to be conferred, the doubt is to be resolved against the corporation or individual claiming such a grant. Public policy does not permit an unnecessary inference of authority to make a contract inconsistent with the continuance of the sovereign power and duty to

make such laws as the public welfare may require. It is hardly necessary to advert, in this connection, to the fact that municipal corporations have only such powers as are conferred by the legislature; and the same principle of strict construction, which forbids that a direct grant of a franchise by the legislature be construed as exclusive, is applicable in the construction of powers delegated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies of the state to grant exclusive franchises or privileges must be as explicit and free from doubt as would be required if the franchise were created directly by the legislature. The power to make the exclusive franchise is denied."

In the case of the *State vs. Minnesota Transfer Co.*, 83 N. W., 32, there was involved the question of whether the city of St. Paul had the power to bind itself to forever maintain a certain bridge over the tracks of the defendant and forever prohibit all crossings at grade of the tracks of the defendant company after the bridge was completed, including crossings by motor lines; the company, on its part, agreeing in consideration of the city binding itself to do these things, to construct the bridge; and upon the question of the power of the council to make such an agreement, the court says, commencing on page 34:

"We have already held that the power of municipal authorities to contract in relation to a given matter does not carry with it, by implication, power to make a contract, even with reference to such matter, which shall cede away control or embarass their legislative or governmental powers or render the municipality unable, in the future, to control any municipal matter over which it had legislative control; and also that a municipal corporation entrusted with powers of control over public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the *explicit* consent of the legislature, because such power is in the nature of a trust held by the corporation for the state."

In the case of *Brenham vs. Brenham Water Co.*, 4 S. W., (Tex.) 143-148, the question was as to the power of the city of Brenham to contract with a company for the furnishing of water, granting an exclusive privilege for twenty-five years, where the charter of the city provided that it "shall be capable of contracting and being contracted with," and gave it power to provide the city with water for the convenience of the inhabitants and the extinguishment of fire, and that the company receiving such right could lay pipes through the streets with the consent of the city and furnish water to the inhabitants thereof; and there was a general law which authorized the

city, in which a water company was authorized, to contract with it for supplying the city with water. The court denied the right to contract for any definite period, and said:

"The charter of the city doubtless gave it power to provide the city with water, and, under this, it may be held that it had the power to make a contract to receive and pay for water to be furnished by some other corporation or person. * * * Its charter, however, is under the general law, and the express power given to such corporations was evidently given to enable such of them as might be located in cities or towns having no such powers as had the city of Brenham to contract with them."

The court further said:

"A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those *necessarily or fairly implied in or incident* to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, * * * not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.

"No express power is conferred upon the city, through either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given.

"The power given to a municipal corporation to contract in relation to a given subject matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter, over which it is given power to legislate, as may be deemed best. If the contract relied on is valid, neither the repeal of the charter of the city nor any other act of the legislature can abrogate it. * * *

"It is now universally conceded that 'powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. * * * The validity of every contract a municipal corporation may assume to make must, at last, depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had

expressly authorized the making of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law."

And on page 152 it is said:

"Municipal officers hold but for short terms, those of the City of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs, as near as may be, in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon such corporation."

In the case of *Thrift vs. Board of Commissioners*, 30 S. E., 349-51, which involved the power of the city of Elizabeth to grant an exclusive franchise for light purposes, the court said:

"All authorities hold that no such exclusive privilege can be granted by a municipal corporation without express legislative authority."

In the case of *Pennsylvania R. R. Co vs. Canal Commissioners*, 21 Penn. State, page 922, which involved the right of the Pennsylvania Railroad to carry freight over the Columbia River, which was denied by the Canal Commissioners, the court said:

"It may be that the privilege which the relators claim might arise by implication out of their charter, or some other of the acts cited by their counsel, if we were at liberty to give to them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the legislature."

In the case of *Logan & Son vs. Pyne*, 43 Iowa, 524-5, which involved the power of the city of Dubuque in granting to the plaintiffs the exclusive privilege and franchise of running for hire omnibuses

for purposes of conveying persons, passengers, and travel and baggage upon the streets of the city to and from the hotels, steamboat lines, and railway stations, the court said:

"The power of municipal corporations is strictly confined within the limits prescribed by the statutes creating them, and will not be extended by the courts upon mere inference. It always depends upon express grant, or must be necessarily implied as incident to other powers expressly granted, or indispensable to the object and purpose for which the corporations were created. Doubts as to the existence of such powers must be resolved against the corporations and in favor of the public.

"A municipal corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation, would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy.* * *

"The power to grant monopolies does not appertain to a municipal corporation, unless upon express grant. It cannot be claimed that a general grant of such powers as pertain to cities would include such as can only be exercised under an express grant. Such a rule would abrogate the doctrine restricting the city to the exercise of such powers as are expressly conferred upon it and carries on its face an obvious construction of terms."

In the case of *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234-241, which was an action to restrain the city from reducing the rates fixed in a franchise, one of the questions involved was as to whether the franchise was granted for a fixed term of 25 years or was without limit as to time. The courtsaid:

"Grants of franchises in perpetuity, or for unreasonably long periods of time, are regarded as against public policy; and if ever valid, the authority therefor must be found in the constitution or statutes of the state."

In the case of *State vs. Cincinnati Gas Light Co.*, 18 Ohio State, 262, which was an action involving the power conferred upon the city of Cincinnati to grant an exclusive franchise for the use of the streets and alleys for the laying of gas pipes therein for the distribution of gas for sale to the inhabitants of such city, the court, after referring to the case of the *Norwich Gas Light Co. vs. Norwich City Gas Light Co.*, 25 Conn., 19, in which the court had held that

a franchise, exclusive for twenty-five years, was void as against public policy, on page 294, said:

"But we do not propose to inquire into the power of the state legislature to confer, either upon a corporation or a natural person, any or all of the franchises and rights with which the present defendant claims to have been invested. And assuming that such a power may be exercised directly we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book, in express terms, or arise from the terms of the statute by implication, so direct and necessary as to render it equally clear.

"By the act of March 1, 1834, 'to incorporate and establish the city of Cincinnati,' power was given to the city council to light said city, or any section or portion thereof, on petition of not less than two-thirds of the lot-owners in the part or parts of the city so to be lighted and to defray the expenses by assessment of a special tax on the lots situated therein. * * *

"But, on the 16th of March, 1839, an act amendatory of the charter was passed, the third section of which is as follows:

"'Sec. 3. That said city council shall also have power to cause said city, or any part thereof, to be lighted with oil or gas, either by petition, as provided for in the act to which this is an amendment, or without petition, and to levy and collect such taxes for that purpose, from the real estate bounding on the section or sections which may be so lighted, and in such manner as they may provide by ordinance, etc.'"

On page 295, the court said:

"The authority to make the contracts must therefore be found, if at all, in the general grant of power to cause the city to be lighted with oil or gas. This power carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the power expressly granted; hence we see no reason to doubt that the city council might, by contract, provide for the lighting of the city by gas; and as the use of the streets and alleys for the purpose of laying gas pipes therein would be almost, if not wholly indispensable to such an undertaking, it would clearly be competent for the city council to grant to the contracting party the right to such use. But

no such necessity is perceived for making such right exclusive. The same streets might consistently be used by two or more persons or companies for the purpose of laying down their gas pipes. If, under the general power here given, a single city council might bind its successors not to make or permit any further use of the streets for a similar purpose for a period of twenty-five years, why not for a hundred years, or in perpetuity? Was such the legislative intention? If so, we fail to discover it, either in the express terms of the statute, or as arising therefrom by clear and necessary implication. * * *

"In view of the well established rules of strict construction to be given to grants of corporate power as against the public, we are constrained to hold that the city council of Cincinnati had no authority, at the time of the passage of the ordinance of 1841, to give to Conover the exclusive right to use the streets of the city for the purposes therein expressed, and that the defendant could therefore acquire no such right by the assignment of his contract."

In the case of *Jackson County Horse Car. Co. vs. Interstate Rapid Transit Co.*, 24 Fed., 306-7-8-9, the question involved was as to the power of the city of Kansas City in the state of Kansas to grant to the complainant the sole right, for twenty-one years, to construct, maintain and operate a railway over and along all of the streets in the city, under the general powers conferred upon such city. Judge Brewer delivering the opinion, said:

"(1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant special privileges; (2) it may, with similar limitations, grant the like power to municipal corporations as to all matters of a purely municipal nature; but, (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as is often epigrammatically said, a doubt destroy the grant.

"Now, coming closely to the question, the legislature has not *in terms* given to the city the power of granting an exclusive privilege of occupying the streets with railroads; it has not *in terms* given it the right to contract away its continuous control of the streets, and its future judgment of the needs of the public in those streets, to individuals for a series of years. Indeed, it has not *in terms* made any specific grant in respect to the occupation of streets by railroads, and their operation thereon.

"Upon what, then, can it be claimed that the city has the power to give to an individual the right to occupy the streets with railroads, secure him that right for a term of years, and also the right of debarring, during such term, every other citizen from a like use of the streets? Under the authority that the city might permit a street railroad, and that the legislature had granted the city a general control and supervision of the streets, it was held that the city could permit the use of the streets with such road, but power to permit one citizen to use the streets in a given way is a very different thing from power to give such citizen the right to keep every other citizen from a like use of the streets. The one is a mere street regulation—a license; the other rises into the dignity of a contract—a franchise. The one may rest upon the ordinary powers of street management and control, the other *requires* the support of a special grant. * * *

"Power to grant all facilities for transacting business does not imply power to forbid all others from transacting like business. Even where a charter is granted by the legislature directly, it grants no exclusive right, unless the exclusiveness is expressly named. * * *

"Will the power to create monopolies be presumed unless it is expressly withheld? That would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named."

In the case of the *Saginaw Gas Light Company vs. City of Saginaw*, 28 Fed., 529-534, which involved the question of the power of the city of Saginaw to grant an exclusive franchise, the court said, quoting from Dillon's work on Municipal Corporations:

"A municipal corporation possesses and can exercise the following powers and no other: First, those granted in express words; second, those necessarily or fairly implied, or incidental to the powers expressly granted; those essential to the declared objects and purposes of the corporation, not merely convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void."

In the case of *Grand Rapids E. E. L. Co. vs. Grand Rapids*, 33 Fed., 659-670-671, which was an action involving the power of the city of Grand Rapids to grant an exclusive franchise for a limited period under delegated power from the legislature, the court said that the ordinance passed was a contract, and further:

"So far, therefore, as this court is concerned, its action in sustaining or overruling the present motion, or in dissolving or continuing in force the injunction restraining the defendant corporation from using the streets of Grand Rapids under the ordinance of May 20, 1887, depends upon the questions above stated, i. e. whether the common council, under the city's charter, had the power to grant the complainant the *exclusive* right of using the streets of the city for the purposes aforesaid. It is conceded that in the charter of Grand Rapids, in force when said ordinance of 1880 was passed, there is no *express* power or authority conferred upon the common council to make such a grant of *exclusive* rights and privileges in, to, or over the streets of the city. The authority for the making of this exclusive grant must, therefore, as complainant's counsel properly admit, be found and sustained, if at all, upon what are called the *implied* powers of the common council. It is too well settled to need the citation of authorities in its support that municipal corporations, which are mere political agencies of the government, forming but parts of the machinery employed in carrying on the affairs of the state, possess and can exercise *only* such powers as are 'granted in *express words*, or those *necessary* or *fairly* implied in or incident to the powers expressly conferred, or those *essential* to the declared objects and purposes of the corporation, not simply convenient, but *indispensable*.' Implied powers, says Judge Cooley, 'are such as are *necessary* in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant.' The courts of the country, state and federal, have not been disposed to extend or enlarge the power of municipalities by implication; on the contrary, they have, in the main, applied to their charter powers substantially the same rule of strict construction that is applied to charters of private incorporation, on the ground, as stated in Cooley's Constitutional Limitations, that 'the reasonable presumption is that the state has granted, in clear and unmistakable terms, all that it has designed to grant at all.'"

On page 668 the court further says:

"When it is considered that corporations, public or private, are creatures of the legislative department of government, existing solely and alone by virtue of the sovereign will, and exercising *only delegated authority* of the state, the strict rule of construction applied to their powers is manifestly the correct one. This principle necessarily follows from the relation corporations occupy to the state. A municipal corporation is not a 'regnum in regno,' but an instrumentality, established by legislative enactment, to which certain powers of action are given for defined public purposes. The corporation may, through its proper officers, perform all acts or make all such contracts and incur all such liabilities as come legitimately within the powers conferred upon it; but all acts and contracts beyond the scope of the

powers granted are void. These fundamental principles lie at the foundation of the law relating to all corporations.

"Before applying these general principles and rules for the construction of the *delegated* powers granted to corporations, whether public or private, it is proper to call attention to the fact that municipalities do not ordinarily or usually possess exclusive control over their streets; on the contrary, it is well settled by authority that the streets of a city are *public highways*, which it is the province of the government, by appropriate means, to render safe and convenient for the use of the public."

And on page 669:

"It is also well settled that the right to use the streets and other public thoroughfares of a city for the purpose of placing therein or thereon pipes, mains, wires and poles, * * * for public and private use, is not an ordinary business in which any one may engage, but is a *franchise* belonging to the government, *the privilege of exercising which can only be granted by the state or by the municipal government of the city, acting under legislative authority.*"

And on page 670:

"To confer *exclusive* rights and privileges, either in the streets of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the state can confer *exclusive* rights and privileges in public streets, dedicated or acquired for public use, and which are held in *trust* for the *public at large.* * * * If the charter powers of the city have invested it or its common council with the *whole sovereign* power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was ultra vires, and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city."

In the case of *Logansport Ry. Co. vs. City of Logansport*, 114 Fed. R., 688, there was involved the question of the power of the city of Logansport to grant to the complainant, a street railway company, a franchise in perpetuity, the statutes of the state providing for the incorporation of street railway companies in perpetuity, and expressly recognizing the exclusive control of the common council of incorporated cities over the streets, highways, alleys and bridges within the corporate limits of such cities, and requiring street railroad companies to ob-

tain the consent of such councils to the location, survey and construction of any street railroad through or across the public streets of any city before commencing construction. The city council of Logansport adopted an ordinance, granting to the complainant the right to lay and construct a single or double track for a street railway in and along the streets and bridges of the city of Logansport and to occupy, maintain and use, and to operate thereon railway cars, etc., in perpetuity, and in passing upon the validity of this ordinance the court says, on page 691:

"The statutes of this state confer exclusive authority, jurisdiction and power over all streets, highways, alleys and bridges within the corporate limits of cities in this state on the common council. In *Eichels vs. Street Railway Company*, 78 Ind., 261; *41 Am. Reports*, 561, it was held that the authority to lay the tracks and operate a railway on the streets of the city can only be conferred by a statute in express words, or by language from which such power must be necessarily implied. Such a power, it was said, is an extraordinary one, and one which cannot be implied from the charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporation. Hence the sole power possessed by the city of Logansport to grant an exclusive and perpetual right to the complainant to occupy and use such streets of the city for street railway purposes as it might from time to time elect, depends upon the acts of 1861 and 1891 above mentioned. We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the city of Logansport any such power? * * * * * * * * * *
It is manifest from a reading of the above mentioned statutory provisions that the legislature has not conferred, in explicit and express words on the city of Logansport the power to grant to a street railway either an exclusive or a perpetual use of its streets for railway purposes. The act of 1861 simply provides that a street railway shall first obtain the consent of such common council to the location, survey and construction of its railroad before the construction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In *Detroit Citizens Street Ry. Co. vs. Detroit Ry. Co.*, 171 U. S., 48; 18 Sup. Ct. R., 732; 43 L. Ed., 67, the question for decision was whether the legislature of Michigan had conferred power on the city of Detroit to grant to the street railway company the exclusive use of its streets. * * * * * *

The court says: 'It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes.' And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891 above mentioned does not explicitly and directly confer the power on the common council of the city of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes.

"The court further says: 'There were many reasons which urged to this; reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust—and those which without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges.' And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise. That such powers must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly established.

"The power to grant the use of its streets in perpetuity not having been granted to the city of Logansport in explicit and express words, is it granted by a necessary implication?

"The Supreme Court in the above cited case, further says:

'Mr. Justice Jackson in *Grand Rapids E. L. & P. Co vs. Grand Rapids E. E. L. & F. G. Company* (C. C.), 33 Fed. R., 659 says: * * *—'That municipal corporations posses and can exercise only such powers as are granted in *express words* or those *necessarily* or *fairly* implied or *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensible.*' This would make 'necessarily implied' mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon, that 'a necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocation an inevitable necessity, we need not stop to remark, or, if it means less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any con-

stitution not prohibiting it—and the power to prescribe the terms and regulations of the occupation derived very little, if any breadth, from the expression of it.'

"But assuming that the power 'to give consent upon such terms and conditions as the common council may see fit,' found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity.

"The Supreme Court further says: 'Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or if inferred from other powers it is not enough that the authority is convenient to them, but it must be indispensible to them.' Can it be successfully contended that the perpetual use of the streets of a city is indispensible to their use for railway purposes? * * * But the grant is open to a more serious objection. It was *ultra vires* of the common council to surrender its control of the streets of the city to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes, consistently with public safety and welfare is a power incapable of absolute alienation by the common council. By those ordinances the common council had undertaken to surrender this power and to remit it to the uncontrolled election of the complainant. * * * But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all of the streets of the city, however injurious it may be to the public convenience, safety or welfare. The public convenience, safety and welfare in this regard are surrendered to the complainant. * * * Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to his charge, to be administered in the interests of the public and not for the private advantage and gains of railway or other corporations."

We have quoted thus fully from the opinion in the above case because the facts therein are so similar to the case at bar. The city of Des Moines, in the ordinance of 1866, if the decision of the Circuit Court is correct, has granted to the railway company the right to enter upon any street of the city of Des Moines, build its tracks thereon whenever it may so elect, and this right is granted in perpetuity. The

only modification of the ordinance is found in the ordinance passed on the 8th day of March, 1890, (Exhibit No. 102, p. 216-217) in which it is provided, in Section 2 thereof, as follows: "Provided that hereafter in laying its tracks on parallel streets the same shall not be laid nearer together than two blocks, unless the city council shall consent thereto." In other words, if the ordinance of 1866 is a valid and binding contract, the Des Moines City Railway may enter upon any street of the city of Des Moines, except such as are within one block of streets upon which they already have tracks, and they may construct thereon their tracks and maintain and operate them, and this they may do forever and forever. In the words of the opinion in the Logansport Railway case above cited, "such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld."

In the case of the *Citizens St. Ry. Co. vs. City Ry. Co.*, 64 Fed., 647-9, which was an action involving the power of the city to grant a franchise in perpetuity, Judge Woods said, page 649:

"It is not a question of perpetuity or irrevocable right. If it were, different rules of construction would prevail. No presumption or inference could be allowed in favor of a perpetual right, and every reasonable intendment against it should be indulged."

In the case of the *Cleveland Electric Ry. Co. vs. City of Cleveland*, 137 Fed., 111, which involved the power of the city of Cleveland to grant a franchise and extensions of the same and the question as to whether or not a franchise can arise by implication, the court said, page 122:

"The public cannot be held to have parted with its fundamental rights except by clear and explicit language, or by implication equally clear. This rule of law is thoroughly established and must not be relaxed. It is essential to the preservation of the rights of the people for whose benefit legislatures and municipal councils are created, and public service corporations permitted to exist. * * *

"In the state legislatures, under the sanction given and limits set by the constitution, is reposed the sovereign power of the state. Some of the power it has delegated to the municipal council. A fragment of its authority, which it may at any moment recall, it has turned over to the council of the city of Cleveland. * * * Now, this delegated sovereignty reposed in the municipality by the state is to be exercised by the agent with no less care than if exercised by the sovereign it-

self. It is true, as urged by counsel, that the city council has plenary power, subject only to certain well-defined limitations; but it is not to be therefore said that, having plenary power, that power may be exercised in any other than the method provided by law, or that it may be assumed to have exercised it when the fact does not *clearly* appear. The council is not merely representative of the people who elect it. It is also the representative of the sovereign. Restrictions are vain if the checks put upon the methods of municipal legislation are not to be respected when they deal with fundamental rights. The rule that obligations arise or rights are granted by mere implication depends upon the nature of the parties, and the character of the obligations and rights. It is a very easy thing for a man competent to contract to have his rights determined by the just implications from his acts. He may find himself parting possession with his property even when he did not intend to do so. But this is all but impossible with a municipal corporation. Indeed, a municipal corporation, through its council or officers, may some times make strenuous effort to part with its property or with public rights, and fail in the effort. * * * But to say that a municipal corporation, the delegate of sovereignty, has parted with one of the powers of sovereignty by *implication*, is to assume that which, while not impossible, can only be supported by the strongest proof, and by an implication so cogent as to be quite as *impressive* and *conclusive* as if the grant had been made in express terms."

The court, quoting with approval from the language of Railroad Company vs. Canal Commissioners, said:

"When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so that we will never believe it to be meant when it is not said."

On page 125, the court said:

'When the matter is susceptible of such easy expression in the English language, it might well suppose that if, by an ordinance, it was intended to fix a period for a franchise, it could be done in unmistakable terms. There is no need of concealment in such cases, and no need for implication."

On page 126, the court said:

"But after all, the conclusively satisfactory answer is that it is intolerable to think that instead of using direct, explicit, and easily framed language to grant a great right which only the sovereign can grant, it may be conveyed by an implication to be raised by a process of reasoning which the lay mind has difficulty in comprehending, and which it could hardly discern at all if not pointed out, and that this implication may be so derived from apparently innocuous and insig-

nificant words lost in the mazes of an ordinance of relatively small consequence. Fundamental powers of the sovereign to be used by a delegated body, naturally untrained in the law's learning, and rigidly rstricted in its use, are not to be so exercised."

In *Wright vs. Nagle*, 101 U. S., 791-96, which involved the power of the inferior court of Floyd county to grant a franchise exclusive in character, the court said:

"Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from the legislature its power will always be construed most strongly in favor of the state. These are elementary principles. The question here is whether the legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the state to establish such ferries and bridges in a particular locality, as the ever-changing wants of the public should, in the progress of time, require. In our opinion, it did not. It gives these courts the right to establish ferries or bridges but not to tie the hands of the public in respect to its future necessities."

In the case of *Minturn vs. Larue*, 23 Howard, 435, which involved the authority of the city of Oakland to establish and regulate ferries, and to grant an exclusive franchise, the court said:

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

In the case of *Coosaw Mining Co. vs. South Carolina*, 144 U. S., 550-561, which involved the construction of an act of the legislature granting power to the complainant company to dig and mine rock in the territory described, the court said, by Mr. Justice Harlan:

"If the act of 1876 is fairly susceptible of either of the constructions we have indicated, as we think it is, the interpretation must be adopted which is most favorable to the state. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of the property, franchises or privileges in which the government or the public has an interest."

In the case of *Detroit Citizens St. Ry. Co. vs. Detroit Ry. Co.*, 171 U. S., 48-53-54, in which the controversy turned upon the power of the city of Detroit over its streets, whether original under the con-

stitution of the state, and hence as extensive as it would be in the legislature, or whether not original but conferred by the legislature, and hence limited by the terms of the delegation, the Supreme Court, through Mr. Justice McKenna, said:

"Did it (the city) get such power from the legislature? It is contended that it did by the act under which the Detroit City Railway Company, the predecessor of plaintiff in error, was organized, and to whose rights and franchises it succeeded. This act is the Tram Railway Act. * * * 'All companies or corporations formed for such purposes (railway) shall have the exclusive right to use and operate any railways constructed, owned or held by them: Provided, that no such company or corporation shall be authorized to construct a railway, under this act, through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe.' * * *

"It is clear that the statute did not *explicitly and directly* confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language *explicit* and *express*, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

On page 54, the court further said:

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in Grand Rapids, etc., Power Co. vs. Grand Rapids Co., says: 'That municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensible.* This would make necessarily implied mean inevitably implied."

Then quoting from an opinion by Judge Lurton as follows:

" 'A necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that, which is imputed to the testator, cannot be supposed.' * * *

"But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise which stops short, or which rather does not extend to granting an exclusive privilege or occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one, contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it which is the test of the cases. The rule is one of construction. Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it. A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. *Consequently*, those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

In the case of *Railway Co. vs. Philadelphia*, 101 U. S., 528-39, which was an action involving the construction of a grant to the Railway Company, the court said:

"Charters of private corporations duly accepted, it must be assumed, are, in general, executed contracts; but the different provisions, unless they are clear, unambiguous, and free from doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as are applied to other legislative grants; the usual rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms."

In Cooley on Constitutional Limitations, 7th Ed., page 296, the author says:

"A municipal corporation having power, under the charter, to estab-

lish and regulate streets, cannot, under this authority, without *explicit* legislative consent, permit individuals to lay down a railway on one of its streets and confer privileges *exclusive* in character and designed to be *perpetual* in duration."

In Dillon on Municipal Corporations, 4th Ed., Section 91, regarding the power of municipal corporations, the author says:

"*Principles of Construction.* Extent of the powers of municipalities, whether express, implied or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, * * * any common law right of the citizen or inhabitant."

In Section 695, the author says: "Exclusive legislation has been sustained when not in conflict with the constitution of the state, though in some cases it has been denied.

"However it may be as respects the power of the legislature, in a particular state, to make the grant exclusive, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least reasonable, implication."

After the adoption of the amendment to the ordinance of December 10, 1866, passed March 8th, 1890, (record pages 9 and 10), the Twenty-third General Assembly passed an act, Chapter 11, which became effective by publication April 30, 1890, in which it is provided that:

"All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled, including animal, electric, steam or other power, whether now known or hereafter utilized.

"Section 2. All ordinances or resolutions of such cities or incorporated towns heretofore enacted granting to any person or company

the right to propel its cars by electricity are hereby declared legal and valid."

At the time of the adoption of Chapter 11 of the Acts of the Twenty-third General Assembly, Code Section 464 of the Code of 1873, heretofore quoted was in force. This gave municipalities the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places.

The act of the 23d General Assembly above referred to gave the municipality the additional power to that already possessed by it to define the motive power by which the street railway receiving and accepting any franchise granted could be operated, and by section two of the chapter validated the amendment to the ordinance of Dec. 10, 1866, passed March 8th, 1890, by which the company was granted the right to use electricity or other practical motor power.

The sections of the statutes heretofore quoted, and to which attention has been called, are all of the provisions of the statutes of the State of Iowa in which power is granted to cities of the first class in respect to the matters under consideration, and we submit that under such provisions the city did not possess the power requisite to make a grant unlimited as to time or in perpetuity as claimed by the complainant. The great weight of authority is clearly to the effect that without an express grant of power so to do municipalities cannot grant franchises which are exclusive or in perpetuity. The power must be granted in explicit terms and cannot be implied from other powers granted.

If it should be held that the city had the power to grant the franchise in perpetuity, and the franchise of 1866 was a grant unlimited as to time, the effect would be to give the Des Moines City Railway Company an exclusive franchise in perpetuity.

The location of the tracks now owned and operated by the Des Moines City Railway Company in the city of Des Moines is shown by the maps, exhibits "A'" "B," "C," "D," "E" and "F." (Record, pages 678-679.)

Exhibit "F" shows the location of the tracks as they existed on the 21st day of December, 1905. (Record 531.) The testimony of J. W. Budd, former city engineer of the City of Des Moines, (Record

373) shows the location of the business district of the city, bridges over the Des Moines River, width of the streets of the city, and the condition of the streets leading from the business district to the residence portion of the city with reference to grades, etc. From this map, Exhibit "F" and the testimony of J. W. Budd, it appears that every street in the business portion of the city, both in East and West Des Moines, and every bridge, on every street in the business portion of the city is occupied by the complainant's street railway tracks, except a portion of West Third and Eighth streets. The grade on Eighth street north of Center, renders its use for street railway purposes impracticable. Tenth and Eleventh streets are open but for a short distance, Tenth street ending at Pleasant and Eleventh at Grand avenue.

All of the east and west streets in the business district are occupied by the tracks of the complainant company, and no other street railway company could reach any point near the business center of the city without the consent and permission of the complainant, and the power of this company to exclude any other street railway company from reaching the business center of the city gives it a practical monopoly, and if the rights of the complainant, as claimed by it, are sustained this monopoly would be in perpetuity.

A franchise exclusive because of existing conditions is just as vicious as a franchise exclusive by its terms.

In the case of *Flynn vs. Little Falls E. W. Co.*, 77 N. W. 38, referred to above, the court said:

"While the ordinance on its face does not purport to grant any exclusive franchise, yet the practical effect is almost necessarily to give the grantees a monopoly for thirty years of the business of furnishing water to the city and its inhabitants. * * * Hence whatever improvements may be made in the future in the methods of supplying the public with water, in the quality of water supplied or in the method of fire protection, the city and its inhabitants are tied down by this ordinance to the present system, and practically confined to the supply furnished by the company for thirty years."

A practical monopoly carries with it the same evil effects as a monopoly granted in terms. The complainant has so conducted its business by laying its tracks in the city of Des Moines on every available street leading from the business district of the city to the

residence portion thereof that it has made it possible for it to exclude all competitors, or to dictate the terms on which they shall compete. If it holds a perpetual franchise, it also holds one exclusive in effect, and the city must depend upon it for street railway service for all time.

It has always been the policy of the State of Iowa to prohibit the granting of franchises or special rights and privileges in perpetuity.

Section 12, Article 8 of the Constitution of Iowa, provides, that subject to the provisions of the article:

"The General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, * * * and no exclusive privilege except as in this article provided shall ever be granted."

It is further provided by Section 1619 of the Code of 1897, Section 1090 of the Code of 1873, that:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted, or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof whenever the General Assembly shall deem necessary for the public good."

This section was adopted in 1873, at the same time that Section 464, granting to the municipalities the right to authorize or forbid the operation of street railways over its streets, alleys and public places.

From these provisions it will be seen that it has been and is the policy of the State of Iowa to prohibit the granting of special or exclusive privileges or immunities, and all franchises so obtained may be altered or abridged or set aside by law at any time.

This question has been passed upon in many cases, prominent among which is *Sioux City Street Railway Company vs. Sioux City*, 78 Iowa, 368, which involved the question as to whether or not a franchise granted to the Street Railway Co., requiring it to pave between its rails only, was impaired by a further requirement to pave an additional amount of the street outside the rails; and in the

case between the same parties in the same volume, on page 742, the same question was involved; the company contending: (1) that the ordinance, upon its acceptance of the provisions thereof, became a contract between the parties; (2) that, as by the express provisions of the contract it was required to pave the space between the rails, the necessary implication was that it should not in the future be subjected to any burdens in addition to that growing out of the paving of the streets; and that such provision is as certainly a part of the contract as though contained therein in express language; and (3) that the subsequent legislation by which the additional burden is sought to be imposed upon it is an impairment of the obligations of the contract, and consequently is void.

The Supreme Court said, in the latter case, on page 745:

"In our opinion the case turns upon the question whether the state had the right, under its reserved powers, to impose the additional burden upon the plaintiff. When the plaintiff became incorporated, the following statute was in force: 'The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control and may be at any time altered, abridged or set aside by law, and any *franchise* obtained, used or enjoyed by such corporation may be *regulated, withheld* or be subject to conditions imposed upon the enjoyment thereof whenever the General Assembly shall deem necessary for the public good.' Code Section 1090. The section occurs in the chapter relating to corporations for pecuniary profit, to which class of corporations plaintiff belongs.

"That the state in granting a charter to a corporation, may reserve to itself the power to repeal or amend the same, and that it may exercise such reserved power, is well settled. (Citing cases.) By the provision quoted above, the state reserved the power, not only to repeal or amend the articles of incorporation of such corporations as should be organized after its enactment, but to impose such conditions upon the enjoyment of the franchises obtained thereunder as the General Assembly might deem necessary for the public good. Plaintiff's franchise consists in the privileges, powers and rights conferred upon it by the general statute and its articles of incorporation, but it assumed them subject to the right and power reserved to the state by the statute. The reservation was a condition of the grant."

In the case of *Mayor of Houston vs. Houston City Ry. Co.*, 19 S. W., 129, where one of the questions involved was as to the right of

the City of Houston to grant a franchise for street railway purposes in perpetuity, the court said that while the common council had legislative authority to grant the franchise in question, its duration was a matter for their exclusive determination, and said:

"They could not, perhaps, abandon or transfer their ordinary control over the streets of a legislative character, so as to prevent the proper and legitimate exercise of this authority by their successors in office. * * * *Nor was it in the power of the common council to create a perpetuity.* Subject to these limitations, however, the wisdom and reasonableness of the grant, and the length of time during which it should continue, were addressed solely to the good judgment of the members of the common council."

In the case of *Flynn vs. Little Falls Electric & Water Co.*, 77 N. W., 38-9, where the common council of the city had the authority to make a contract for the water company to pay an agreed price for the supply of water to the city, and for fire protection, the court said:

"We have no doubt as to their power to contract with this or any other water company with reference to furnishing the city and its inhabitants with water; and in as much as it might be impossible to induce any individual or corporation to expend the necessary capital to construct a water works in a small village or city without assurance of patronage by the municipality itself for some definite amount and time, we have no doubt of the power of the village or city council to make a time contract with a company for supplying the city with water for fire protection, providing the same is reasonable. * * *

"But the power of municipal authorities to contract in relation to a given matter does not carry with it, by implication, power to make a contract, even with reference to such matter, which shall cede away control or embarrass their legislative or governmental powers, or render the municipality unable, in the future, to control any municipal matter over which it had legislative control. Where municipal authorities are authorized to contract in relation to a particular matter, they have a discretion as to methods and terms, with the honest and reasonable exercise of which a court cannot interfere, although they may not have chosen the best method or made the most advantageous contract; but this is not an unlimited and arbitrary discretion to make any kind of a contract they see fit, as the court below, in its memoranda, seems to think. If it is, the City Council might have made a contract running one hundred or even five hundred years, as well as thirty years. This would be a very dangerous doctrine, for, by reason of the incompetency or dishonesty of these officials, the power of a municipality might thus be bartered away for a long period of time, for so long a period of time as to practically disable it from performing its public duties."

The court held the ordinance was void.

In the case of the *Marshalltown Light Co. vs. Marshalltown*, 127 Iowa, 637-640, which involved the power of the city to require the Street Railway Company to pave the street outside its rails, when by the terms of its contract with the city it was only required to pave between the rails, where there was an express exemption in the contract or ordinance that the Railway Company should not be required to pave except between the rails, the court held that Section 1619 of the Code of 1897, (Section 1090 of the Code of 1873), became a part of the contract, and gave the legislature and municipality authority to regulate, withhold or subject to conditions the franchise granted by the contract.

In the case of *Thrift vs. Elizabeth City*, 122 N. C., 31; 44 L. R. A., 427-9, which involved the power of the city to grant a franchise in perpetuity for the supply of water to the city under the Constitution of the state, which provided that perpetuities and monopolies are contrary to the genius of a free state and ought not to be permitted, the court said:

"A monopoly need not be a perpetuity, nor is a perpetuity necessarily a monopoly, but both exist either jointly or severally within the constitutional prohibition. There can be few, if any, monopolies more dangerous in their tendencies, and unjust and harmful in their results, than those that pertain to municipal corporations. In the present age of activity in scientific research, and wonderful development in mechanical inventions and discoveries, it is highly improbable that any present system will long remain the best. Improved methods and cheaper appliances will result, and yet the town would deliberately surrender to a private individual its highest attributes of delegated sovereignty, and would place beyond its power for nearly a generation all opportunity for securing for its citizens the benefits and improvements of a progressive age. * * * The courts might afford relief, but it is the better public policy to encourage competition instead of fostering monopolies, and thus, as far as possible, avoid the necessity of judicial interference."

In the case of the *Grand Rapids E. E. L. & P. Co. vs. Grand Rapids E. L. & F. G. Co.*, 33 Fed., 659-672, which involved the power of the city of Grand Rapids to grant an irrepealable ordinance for a limited time for the use of the streets for wires and poles for electric light, the court held that the contract was ultra vires and void, and said, page 672:

"Looking at the question of legislative intent from another standpoint, we find that it is not the policy of the state of Michigan to grant

irrepealable franchises and privileges to private corporations. Article 15, Section 1, of the state constitution provides that, 'Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be *amended, altered or repealed.*' Now, by the ordinance of 1880, if valid, the complainant, a corporation organized under the laws of the state, has secured not only an exclusive franchise belonging to the city, but an irrepealable privilege such as the legislature could not have conferred. Is it to be presumed that the legislature, under its constitutional authority 'to confer upon incorporated cities such powers of a local, legislative and administrative character as they may deem proper,' intended to invest the common council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city, and thereby confer upon the grantees privileges or franchises not subject to alteration, amendment, or repeal—rights which the legislature could not itself have directly conferred. If such a presumption is proper, the conclusion is reached that the agencies or creatures of the state may, in the exercise of derivative and delegated powers, do what the legislature itself could not. This would violate the well-settled rule that the legislature cannot do indirectly, through the local government, what the people have by their constitution restricted it in doing directly."

In the case of *Sioux City Ry. Co. vs. Sioux City*, 138 U. S., 98-107-108, the Supreme Court of the United States sustained the Supreme Court of the State of Iowa in the cases decided and referred to in the 78 Iowa, and said:

"The company took its franchise subject to such legislation as the state might enact. This is plain from the provision of Section 1090 of the Code. The company took its charter subject to the provisions of that section."

"It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company. Under Section 1090 of the Iowa Code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of the franchise (amend or withhold)which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the General Assembly."

In the case of *Hamilton Gas Light Co. vs. City of Hamilton*, 146, U. S., 258-69, which involved the power of the city of Hamilton to amend or revoke the charter of the Gas Light Company, the Supreme Court said:

"By the constitution of Ohio, adopted in 1851, it was declared that 'no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly;' that 'the General Assembly shall pass no special act conferring corporate powers,' and that 'corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.' If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gaslight to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate. * * * The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

In the case of *Schurtz vs. Cook*, 148 U. S., 397-410-411, which involved the power of the legislature to amend a franchise constituting a contract, where the constitution of the state of New York reserved to the state the power to alter, change or repeal all such general laws, and that the charter of every corporation that should be granted by the legislature should be subject to alterations, suspension or repeal in the discretion of the legislature, the court said, after approving the doctrine laid down in the case of *Hamilton Gas Light Co. vs. City of Hamilton*, 146 U. S., 258, that the grantee of the franchise took the same subject to the limitations imposed either by the constitution or the general law of the state.

IV.

THE ORDINANCE OF DECEMBER 10, 1866.

If the court should find that under the provisions of the constitution and under the legislative acts existing at the time the ordinance of December 10, 1866, was enacted, or at the time of its re-enactment

in 1874, the respondent city had been delegated the power to grant a permanent and perpetual franchise or contract for the use of the streets, alleys and public places for street railway purposes, the next question for the court's consideration and determination is as to the complainant's rights under the ordinance of December 10, 1866, and including the subsequent amendments thereto.

The sections of that ordinance which are material to this inquiry are:

"Section 1. That consent, permission and authority is hereby given and granted to, and duly vested in the Des Moines Street Railway Company and their successors and assigns to lay a single or double track for passenger railway lines * * * upon and along all the streets * * * and over the bridges and on such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, *and for the time*, and upon the conditions hereinafter mentioned and prescribed. (Record, p. 18.)

"Section 10. The rights herein granted to said company to operate said railway shall be exclusive for the term of thirty years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to said company." (Record, p. 20.)

"Section 14. Within thirty days from the publication of this ordinance, said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed * * *." (Record, p. 22.)

The complainant claims that the grant contained in Section 1 of the ordinance of December 10, 1866, was unlimited as to time and perpetual, and by reason thereof, it is vested with the right to lay a single or double track for passenger railway lines—upon and along all the streets —and over the bridges and on such streets in the City of Des Moines, and that it has the authority to keep, maintain, use and operate thereon railway cars for all time to come; and that in addition to such grant, the rights conferred were to be exclusive for operation by animal power for thirty (30) years.

The respondent claims that by the granting clause of this ordinance, the grantee, and its successors in interest, were given the right "to lay a single or double track for passenger railway lines—upon and

along the streets—and over the bridges and on such streets in the city of Des Moines, and that authority was given the company and its successors in interest, to keep, maintain, use and operate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed." That the granting clause makes reference to the time thereafter mentioned in the ordinance, which grant is referred to in Section 10 of the ordinance, which provides, "the rights herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon; and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privilege which will impair and destroy the rights and privileges herein granted to said company."

The first mile of track was completed and cars running thereon on the first day of January, 1868, and the thirty-year period referred to in the ordinance, therefore, expired January first, 1898.

(Opinion of the court, record page 38. Decree in *Des Moines Street Railroad Co. vs. City of Des Moines*, paragraph 10 of the bill, record p. 5. Evidence of M. P. Turner, record, p. 455.)

The ordinance contains a number of other sections, but only in Sections 1 and 10 is the term or duration of the rights granted mentioned or referred to in any way. Certain rights and privileges were granted to and vested in the company and its successors in interest by Section 1. Section 10 says, "the rights herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid.' In Section 1, the company is given the right to operate its railways on the tracks laid down by it in the streets of the city; and if Section 10 of the ordinance is construed to apply only as a limitation as to the time of the exclusive feature of the contract, it would mean that the company could operate its own railway exclusively for thirty (30) years. This, the company would have a right to do under a general grant to occupy the streets with street railway tracks. The company wanted something in addition to that privilege, for such an exclusive feature would be of little or no value. It wanted the city placed in a position where it could not give to some other person or corporation the right to lay down tracks and operate cars on streets not occupied

by the company, for without such a prohibitive provision, it would have competition, and competition was a thing it was seeking to avoid. To effectually foreclose the city in this respect, the further clause was added to Section 10 of the ordinance: "And the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to said company."

This gave the company a contract from the city whereby it would not grant to some other person or corporation the right to lay street railway tracks on streets not occupied by the company, and to operate cars over the same. Without this clause, the city could have granted a like privilege or right to lay tracks and run cars on streets not occupied by the grantee company, provided, only, that the grantee company, or its successors in interest in the ordinance of December 10, 1866, did not at the time occupy the street. The city, by the last clause of Section 10, was prohibited from granting any privilege that would impair or destroy rights or privileges granted in the ordinance of December 10, 1866, for the period of thirty (30) years. This was a definite and fixed term, and after the expiration of such definite and fixed term, the city had the right to grant any right or privilege that would impair or destroy the rights and privileges contained in the ordinance of December 10, 1866; so that, in accepting the ordinance, the grantee company and its successors and assigns took the same with the provision that the city at least had the right, after the expiration of thirty (30) years from the completion of the first mile of track and the running of cars thereon, to grant to some other person, firm or corporation such rights and privileges as would destroy and take away all of the rights contained in the ordinance.

While it is true that Section 10 does not refer back to Section 1 in specific terms, Section 1 does refer to some subsequent section as fixing the time the rights and privileges granted shall endure, for it says that the rights and privileges are granted *for the time*—hereinafter mentioned, and Section 10 is the only subsequent section of the ordinance mentioning the duration of the grant of the rights contained in the ordinance.

Ordinances or contracts making grants are construed so that all parts of the instrument are to be read together and taken into account in arriving at the proper interpretation of the grant. Applying this rule, Section 1 grants the rights and privileges for the time hereinafter mentioned. This is an unequivocal reference to some section of the ordinance which follows, wherein the duration of the grant of the rights and privileges is mentioned and prescribed. Section 1 does not purport to name the term of the grant, but in precise words says that it is for the time mentioned in some succeeding section, and the succeeding section wherein the duration of the grant of the rights and privileges is mentioned is Section 10.

Section 14 of this ordinance provides that, "Within thirty days from the publication of this ordinance, said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, etc." From this section, it will be seen that the company accepted the ordinance with the full knowledge that certain limitations were expressed in it. Certain conditions were named in the ordinance and certain regulations were made for the laying down of the tracks and operation of the cars, and certain limitations were made as to the duration of the grant. If the duration of the grant were unlimited as to time, and the exclusive privilege granted in Section 10 was the only limitation contained in the ordinance, Section 14 would have provided that the acceptance must be by the company with the conditions, regulations and limitation (singular) above expressed; but it must have been clear in the minds of the city council, when the ordinance was passed, that there were two limitations, one limitation referring to the general grant as a grant, and the other referring to the term or duration of the exclusive or prohibitive feature of the grant. If this were not true, this portion of the ordinance is meaningless.

There were a number of conditions mentioned in the ordinance, subject to which the company was compelled to take the grant. There were a number of regulations which the company had to accept, and there were two limitations placed in the ordinance which the company was required to accede to before the grant would become in full force and effect, and these limitations are those above referred to.

If it could claimed that on account of the language used in the ordinance of December 10, 1866, there was any uncertainty, doubt or ambiguity in reference to the duration of the grant, or that it was uncertain in this respect, such uncertainty, doubt or ambiguity must be resolved in favor of the public and against the grantee, and no right or privilege can be obtained by presumption, inference or implication.

We have called the court's attention to many of the leading cases in the state courts as well as the Federal courts in reference to this rule, and also as to the text laid down by the most eminent authors in this country.

Judge Dillon, in his work on *Municipal Corporations*, Sections 89 and 91, says:

"A fundamental and universal rule, which is as reasonable as it is necessary, is that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee."

The Supreme Court of the State of Iowa has sustained this rule, and in the case of *Clark, Dodge & Co. vs. City of Davenport*, 14 Iowa, 484, says:

"It is a well-settled rule of construction of grants by legislatures to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. *Any doubt or ambiguity arising out of terms used by the legislature* must be resolved in favor of the public."

And in the case of *Keokuk Water Co. vs. Keokuk*, 80 Iowa, 137, the provision of the ordinance being:

"Section 1. That all the rights, privileges &c. * * * extended to and imposed upon the Keokuk Gas Light & Coke Company—are granted—for the term of twenty years from the 1st day of July, 1868.

"Section 2. The city of Keokuk, at the end of ten years from the date aforesaid, shall have the right, by giving the company twelve months' notice, to purchase all of the property, rights and privileges * * * of the company * * * at a fair valuation * * *. In case the city shall not make the purchase at the time aforesaid, it shall have such right at the end of each succeeding five years thereafter; and the said gas company shall continue to possess and en-

joy all the aforesaid rights and privileges, and subject to the same conditions and restriction aforesaid, until such purchase shall have been made."

On page 141, the court said:

"The first section declares in unmistakable language that the privileges granted to plaintiff are for the term of twenty years from July 1, 1868. If this section stood alone on this subject, it could not be claimed that plaintiff's privileges extended to a later date. Section 2, after providing how the city might purchase the works at the end of ten years, or at the end of each succeeding five years thereafter, provides that 'said gas company shall continue to possess and enjoy all the aforesaid rights and privileges, * * * until such purchase shall have been made.' Taking this provision alone, it is obvious that plaintiff's privileges were extended, not for twenty years, but until the city purchased at the time and in the manner provided. We are not at liberty to reject either of these provisions, but are to take the whole ordinance together, and to say therefrom what was intended by the parties in adopting and accepting the same. We assume that the language in both sections was employed purposely. To say that the privileges to plaintiff were extended without other limit than until the city should purchase the works, is to entirely ignore the twenty-year limitation in the first section. If the privileges to plaintiff were to extend until purchase was made, it was an idle use of words to say that it was for the term of twenty years.

"We think the purpose in following the provisions as to purchase, with the provisions that the gas company should continue to enjoy its privileges until the purchase was made, was to avoid any question as to the gas company's rights before a purchase was made, and not to extend the privileges beyond the twenty years named."

And in the recent case of *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234, the court says:

"Grants or franchises in perpetuity or for unreasonably long periods of time are generally regarded as against public policy; and if ever valid, the authority therefor must be found in the constitution and statute of the state."

The first case decided in the United States Supreme Court on this subject is the case of *Charles River Bridge vs. Warren Bridge*, 11 Peters Report, 420, which involved the claim by the complainant that by implication, a franchise between itself and the state excluded the state from granting a similar right to another bridge company to erect a bridge. The court said:

Page 544:

"The rule of construction is well settled in such cases, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol., 793, in the case of *The Proprietors of the Stourbridge Canal vs. Wheely and others*, the court says: 'The canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.' And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision."

On page 545, the court said:

"Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by *implication*, make the terms of a charter in one of the states more unfavorable to the public than an act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are *restraining*, within the *strictest limits*, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by *implication*; and construing a statute more unfavorably to the public and to the rights of the community than would be done in a like case in an English court of justice. * * *

"In the case of the *United States vs. Arredondo*, 6 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court; and the principle recognized, that in grants by the public, nothing passes by *implication*."

On page 546:

"The same rule of construction is also stated in the case of *Beaty vs.*

The Lessee of Knowler, 4 Pet. 168, decided in this court in 1830. In delivering their opinion in that case, the court say: "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise being restrictive of individual rights cannot be extended beyond the letter and spirit of the act of incorporation.'"

On page 547, the court said:

"It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established: and it can never be assumed, that the government *intended* to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A state *ought never to be presumed to surrender this power*, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment *ought not to be presumed* in a case in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value, if by *implication and presumption* it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of *privileged corporations*. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

On page 549:

"The inquiry then is, does the charter contain such a contract on the part of the state? (Exclusive to erect a bridge.) Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must

be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiff in error contend for, and none can be *implied;* and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience and of advancing the public prosperity, by providing safe, convenient and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the state, unless it shall appear by plain *words* that it was intended to be done."

In the case of *Saginaw Gas Light Co. vs. City of Saginaw*, 28 Fed., 528-539, the court said:

"It is scarcely necessary to say that, in the jurisprudence of Anglo-Saxon communities, gifts of the sovereign are treated with less consideration, and a totally different rule of interpretation obtains. Nothing is better settled than that statutes creating monopolies, granting franchises, and charters of incorporation, must be construed liberally in favor of the public, and strictly as against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by courts. Whatever is not unequivocally granted in such act is taken to have been withheld. All acts of incorporation, and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies.

"In regard to the rights of franchises, it is said by the Supreme Court that, where the grant is designed by the sovereign power to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and *therefore the grant is not to be extended by implication, in favor of the grantee,* beyond the obvious and natural meaning of the words employed. Other authorities, putting it sententiously, say that a doubt is fatal to a grant."

On page 540:

"'A corporation is strictly limited to the exercise of those powers which are specially conferred upon it. The exercise of a corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and the spirit of the act of incorporation.' (Citing cases.)

"But it is useless to multiply authorities in support of this proposi-

tion. The general principle is too firmly established to admit of argument."

In the case of *Grand Rapids R. T. Co. vs. Grand Rapids E. L. Co.*, 33 Fed., 659-667, the court said:

"The courts of the country, state and federal, have not been disposed to extend or enlarge the power of municipalities by implication. On the contrary, they have, in the main, applied to their charter powers substantially the same rule of strict construction that is applied to charters of private incorporation, on the ground, as stated in Cooley's Constitutional Limitations, that 'the reasonable presumption is that the state has granted, in clear and unmistakable terms, all that it has designed to grant at all."

In the case of the *Oregon Ry. Co vs. Oregonian Ry. Co.*, 130 U. S., 1-26, the court said:

"It is to be remembered that where a statute making a grant of *property, or of powers, or of franchises*, to a private individual or a private corporation, becomes the subject of construction *as regards the extent of the grant*, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public. As was said in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet. 420, 'in this court the principle is recognized that in grants by the public nothing passes by implication.'

"Therefore if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated and to rigid construction in regard to the powers granted."

In the case of *Stein vs. Bienville Water Co.*, 141 U. S., 67-80, the court said:

"If the contract under which the plaintiff claims was doubtful in its meaning, the result would not be different; for, while it is the duty of the courts not to defeat the intention of parties to a contract by a strained interpretation of the words employed by them, it is a settled rule of construction, that, 'in grants by the public nothing passes by implication:' and, 'if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.' (Citing the Binghampton Bridge case.) Guided by this rule, in respect to which there

is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different steam or river."

In the case of the *Central Transportation Company vs. Pullman Car Company*, 139, U. S., 24, the court said, page 49:

"By a familiar rule, every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention on the part of the government to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

In the case of *Knoxville Water Co. vs. Knoxville*, 200 U. S., 22-33-4-6-7, which involved the construction of the franchise granted by the city of Knoxville to the water company, where the franchise provided that the city "should not grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon public streets, lanes or alley, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, 1883;" also, "to pay said company for rent of seventy-five hydrants, hereinbefore stipulated to be erected, $50.00 each per annum, payable in quarterly installments on the last day of each quarter;" and, " to pay in addition to the annual rent of $50.00 as hereinbefore provided, and as an additional rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the state and the ordinances and resolution of the city, would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity and value as that owned by the said water company within the corporate limits of the city of Knoxville," the question was as to

whether the city could erect a water plant of its own. The court said, page 32:

"The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional right of the Water Company, establish and maintain a separate system of waterworks of its own. * * *

"The principles which must control in determining the scope and obligations of the agreement of 1882 have been clearly outlined in our decisions. We may assume, for purposes of the present discussion, but without deciding, that the city of Knoxville was invested by the legislature with full authority, or that under its general municipal powers it could bind itself by contract, to give to a single corporation or company the *exclusive* right for a specified period to supply water for the use of itself and its inhabitants. It will yet be conceded that whatever authority it possessed in this matter was granted solely for the public good, and that in every substantial, legal sense the agreement with the Water Company is to be deemed a public grant, entitling that company to exercise certain public functions that appertain to the city as a municipal corporation.

"Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, 544, 547, 548, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications or presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract "'must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given by the act;'" that, "it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created;" and that those who insist that the government has surrendered any of its powers or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded. "Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public." Such were the words of this court in *Turnpike Co. vs. Illinois*, 96 U. S., 63, 68. The universal rule in doubtful cases—this court said in *Oregon Railway Co. vs. Oregonian Ry Co.*, 130 U. S., 1, 26—is that " the construction shall be against the grantee and in favor of the government." As late as *Coosaw Mining Co. vs. South Carolina*, 144 U. S., 550, 562, this court said: "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an in-

terest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell vs. Grandjean*, 111 U. S., 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases.

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

On page 37, the court said:

"It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers."

In the case of *Blair vs. Chicago*, 201 U. S., 400, which was an action involving the interpretation of the grants by the state of Illinois, to the Street Railway Company in the city of Chicago, the provisions of which are set out on page 464, the court, on page 463, said:

"We may premise, before taking up this act for detailed consideration, that it is a firmly established rule which we shall have occasion to refer to later on in this discussion, but which must be borne in mind as we enter upon the consideration of this act, that one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in *plain terms*, for nothing passes by the grant except it be clearly stated or necessarily implied.'

The court, on page 467, said:

"It is contended that unless the construction insisted upon for the companies is given to the act, no force or effect is given to the expres-

sion 'during the life thereof,' and a well recognized rule is invoked that all parts of this law must be given force and effect in interpreting its meaning. While it is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for, if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred, we think this act can be given a construction which shall give some meaning and effect to the words 'during the life hereof.' * * * But if the meaning is in doubt, it must be resolved against the corporation and in favor of the public."

On page 469, the court said:

"It is not to be understood that the interpretation herein suggested frees the judicial mind from doubt as to the meaning of this act, any more than its ambiguous and contradictory phrases could have impressed upon the legislative understanding the meaning now contended for by the companies. It is the application of the settled rule of interpretation to such grants which invalidates the claims made for it, rather than any clear and satisfactory interpretation which has been suggested by counsel or arrived at by the court."

On page 471, the court further said:

"Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

The court quotes with approval from the case of the *Pennsylvania Railroad Company vs. Canal Commissioners*, 21 Pa. St., 9-22:

"Words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature."

" 'The just presumption,' says Cooley in his work on Constitutional Limitations, 7th Ed., p. 565, 'in every such case is that the state has granted in express terms all that it designed to grant at all. This is sound doctrine, and should be vigilantly observed and enforced.' "

On page 472, the court said:

"Concurrent with this principle (viz.: that laid down in the Dartmouth College case) and to be considered when construing an alleged grant of this character is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often cited case of *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, and has been uniformly applied in many subsequent cases in this court."

The court quotes with approval from the case of *Perrine vs. Chesapeake & Delaware Canal Co.*, 9 How. 177-192, as follows:

" 'The rule of construction in cases of this description * * * is this—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' "

The court also quotes with approval from the case of *The Binghampton Bridge*, 3 Wall., 51-75, and of the *Fertilizing Company vs. Hyde Park*, 97 U. S., 659, and says, on page 473:

"Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865, contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years, and for that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are hereby asserted, fail when they can only be maintained by strained construction in their favor."

The principle of strict construction, and that no right or privilege can be granted or extended by implication, inference, intendment or presumption, applies equally to the granting of powers to the municipality by the legislature, or the granting of franchises by the legislature, or the granting of franchises by municipal corporations.

In the case of *Long vs. City of Duluth*, 51 N. W., 913-4, the court said, on page 914:

"It is hardly necessary to advert in this connection to the fact that municipal corporations have only such powers as are conferred by the legislature; and the same principle of strict construction which forbids that a direct grant of a franchise by the legislature be construed as exclusive, is applicable in the construction of powers delegated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies by the state to grant exclusive franchises or privileges must be explicit and free from doubt, as would be required if the franchise were created directly by the legislature."

In the case of *Jackson Co. H. Car Co. vs. Interstate R. T. Co.*, 24 Fed., 306, the court said. on page 309, after quoting from Dillon on Municipal Corporations to show that the legislative grant of authority is not exclusive:

"And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges, when it has in terms granted no such power?"

As has been shown in Division III of this Argument, the City of Des Moines has never had the power or authority to grant a franchise in perpetuity and to give to the ordinance of 1866 the construction that it is perpetual in terms would be to render the ordinance void. It is a familiar rule of construction of statutes and ordinances that where a statute or an ordinance can be given two constructions, one of which renders the statute or ordinance constitutional and valid and the other renders it unconstitutional and invalid, that construction will be adopted which will give force and effect to the ordinance. No citation of authorities is needed upon this proposition because it is supported not only by all of the cases but by common sense. If then the ordinance of 1866, is so ambiguous in its terms that it may be construed to be a grant either for thirty years or a grant in perpetuity the construction will be adopted that it is a grant for thirty years, since otherwise a construction must be adopted which will render the contract or ordinance wholly void.

Contemporaneous Construction.

It is claimed by the complainant that the construction placed

upon the ordinance of 1866 at the time of its passage was to the effect that it was to be a grant in perpetuity. The only evidence presented upon this point is the evidence of Mr. Jefferson S. Polk (Record, page 449 et seq.). Mr. Polk's testimony is to the effect that he drew the ordinance in question, that he was one of the incorporators of the company which secured its passage, and was attorney for the company and that he and the company intended that it should be a grant in perpetuity and that it was so considered at that time. Aside from the testimony of Mr. Polk there is nothing to show what was in the minds of the members of the City Council at the time of the passage of this ordinance and it can hardly be claimed that the construction which Mr. Polk, the man who secured the grant, placed upon it is binding upon the City of Des Moines. The general rule is that the meaning of an ordinance must be gathered from the ordinance itself and not from contemporaneous statements of the individuals who made it or who voted for it. *McQuillan Municipal Ordinances,* Page 292.

Statements made by members of the Council, or others, at the time of the passage of an ordinance cannot be resorted to for the purpose of explaining the meaning of the terms used; if they can be resorted to at all, it is only for the purpose of ascertaining the general object of the legislative purpose and the mischief sought to be remedied. *Ah Kow vs. Nunan,* 5 Sawyer, 552-560-561.

In the case of *Blair vs. Chicago,* 201 United States, 400-470 and 471, referred to above, this court was called upon to determine the duration of certain grants made by the Legislature of Illinois for the construction of street railways in the City of Chicago, and it appears that the acts making the grants had been once vetoed by Governor Oglesby the then Governor of Illinois, and that in his message returning the act, he gave to it the construction which was contended for by the railroad company, but this court refused to attach any importance to this contemporaneous construction.

In the case at bar the record shows that the ordinance of 1866 was prepared by the attorney for the party securing the grant and that it was submitted to the Council with a view to obtaining the most liberal grant of privileges they were willing to give. How little

importance then should be attached to the construction placed upon the ordinance by the one who drew it. If the construction placed by Governor Oglesby upon the grants to the Chicago Railway Companies was given no weight in the Blair case, how much less is the opinion of Jefferson S. Polk entitled to consideration in this case. Governor Oglesby was part of the machinery of government in Illinois; it was his duty as Governor to examine every act of the Legislature and to determine its meaning in so far as he could before passing upon it, and in the exercise of that duty he placed a construction upon the grants considered in the Blair case and called the attention of the Legislative branch of the government to that construction. Certainly the record in this case does not present any evidence in the way of contemporaneous construction which is entitled to consideration.

Practical Construction.

It is claimed by the Appellee that there has been placed upon the ordinance of December 10, 1866, a practical construction by the parties thereto to the effect that it is in perpetuity. This practical construction is said to be shown on the part of the City by the passage of certain resolutions and ordinances which are set forth in the record. Substantially exery resolution, ordinance, or other act of the City relating to street railways which has been passed or has taken place during the past twenty years has been offered in evidence, and while in the many resolutions and ordinances passed since the expiration of the thirty year period fixed in the Turner franchise, the Des Moines City Railway Company has been recognized as the owner of the street railways, there is not in any of said acts any mention of the Turner franchise or of the duration of the right had or claimed by the Company under it, and in only three resolutions passed after the consolidation in 1889, and prior to the expiration of the thirty year period, was there any recognition of the Turner franchise. These three resolutions are shown as Exhibit No. 103 (Record, page 218), Exhibit No. 105 (Record, page 219), and Exhibit No. 111 (Record, page 224); the first two of these resolutions were passed in 1890 and the third in 1893; at that time the Turner franchise was in force, and the reference to it as being still in force certainly could not be construed to be a recognition of its existence as a valid contract after the expiration

of the thirty year period in 1898. In 1895 the City of Des Moines did pass an ordinance granting the Des Moines City Railway Company the right to carry United States mail, express and freight, and material for the construction and operation of its road (Exhibit 151, Record page 292), Section Eight of this ordinance (Record, page 294), providing:

"Nothing in this ordinance contained shall be construed as to extend the charter of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charter, and if the charters of any of the said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time."

The grant contained in this freight ordinance was for a period of eight years and the only franchise which by any possible construction could expire within the eight years was the Turner franchise or the franchise of 1866, so that in this ordinance of 1895 the City Council placed a construction upon the Turner franchise to the effect that it might expire within the period fixed in this ordinance, to-wit, in less than eight years from 1895. In other words, the City Council of the City of Des Moines, instead of conceding by its actions that the Turner franchise was perpetual, in 1895 directly indicated that it was of the contrary opinion.

If the Turner or Narrow Guage franchise expired by its terms on January 1, 1898, the exercise of rights under it after this period could not renew or extend the time of the grant, nor could the officers of the City place upon the franchise a construction extending the time which would be binding upon the City. It was held by the Supreme Court of Iowa in *Cedar Rapids Water Company vs. Cedar Rapids*, 118 Iowa, 234-245, citing *Bridge Company vs Prang*, 35th Michigan, 400, and *Inclined R. Company vs. Cincinnati*, 52d Ohio State, 609, that the continued exercise of the right after the expiration of the franchise under which the right was acquired would not operate to renew the franchise or extend the time thereof or estop the public to insist upon the cessation of the use.

The case of the *Cincinnati Inclined Plane Co. vs. Cincinnati*, 52d Ohio State, 609, 44 N. E., 327, is particularly applicable to the case under consideration. In that case the company obtained a franchise for a street railway for a specific term of years. Under the statutes, to renew or extend the term of the franchise required the concurrent action of both the City Council and the Board of Public Works. After the franchise expired the Board of Public Works, acting alone, took certain

action, from which it was claimed there was an implied renewal or extension of the grant or franchise, and thereafter the Company expended a large amount of money in reconstructing and improving its road. It was held that where the concurrent action of both boards was required, there was no renewal or extension by the acts of one without the concurrence of the other and that the continued occupation of the streets and expenditure of money, by the Company in reliance upon the action of the Board of Public Works would not estop the City from proceeding to oust the Company from the streets.

In the case at bar the company uses in operating its road electric power transmitted over electric wires. The statutes of Iowa provide: Code Sec. 775: "Cities and towns shall have the power to authorize and regulate * * * street railway and other electric wires and the poles and other supports thereof." Sec. 776: "No franchise shall be granted, renewed or extended by any city or town for the use of its highways, avenues, alleys or public places for any of the purposes authorized in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election." In Ohio the concurrence of the Council was necessary and the attempted renewal was held to be invalid because the Council did not act; in Iowa the approval of the legal electors is required and there can be no renewal without such approval. In either case no renewal will arise by implication from the acts of one of the bodies which must concur in the grant or renewal or from the continued occupation of the streets or the expenditure of money upon the road.

Under the law laid down in these cases it would be immaterial if the City Council in every resolution and ordinance passed by it since 1898 had expressly recognized and stated that the Turner franchise was a grant in perpetuity for the reason that it had no power to grant a franchise or to renew or extend the term thereof, and if it could not do this directly, it certainly could not do it indirectly. If the City Council had passed an ordinance, the express purpose of which was to recognize the perpetuity of the Turner franchise, it would have been ineffective because it would lack the consent of the electors of the City of Des Moines, and if such an ordinance would be ineffective, of how much less effect for this purpose are the resolutions and or-

dinances and other acts which do not, either in terms or in any other manner, refer to or recognize the existence of the Turner franchise.

Furthermore the Des Moines City Railway Company is the owner of the franchise granted in 1888, known as the Broad Guage Franchise, which franchise, by its terms, expires in 1913. This franchise was broad enough to cover every street in the City if the proper steps were taken by the Company, the authority given being to construct, maintain and operate a system of electric street railways on certain streets named and "such other streets and alleys as the Company may select with the consent and approval of the City."

As will be hereafter pointed out in this argument, the Railway Company can claim no rights under this ordinance at the present time, but why should all of the acts of the City, in relation to street car matters be construed to be a recognition of the Turner Franchise, and not of the Broad Guage Franchise. The resolutions and ordinances refer to no particular franchise, and here is a franchise which has not yet expired by its terms. How much more probable, if the acts of the City are to be construed as a recognition of a right on the part of the railroad company to occupy the streets of the City and to maintain its tracks, that these acts were intended as a recognition of its rights under the Broad Guage Franchise rather than a recognition of rights existing under the Turner Franchise. If this court should hold that the acts of the City do constitute recognition that the Street Railway Company has rights in the City of Des Moines, and there is any ambiguity or doubt as to the purposes and effect of the acts referred to, that is, as to whether they were intended as a recognition of the Turner Franchise as perpetual, or as a recognition of the right to operate the street railway under the unexpired term of the Broad Guage Franchise, the construction should be in favor of the City and against the Company.

The appellant insists that the City of Des Moines and its officers have never in any manner, either directly or indirectly, placed a construction upon the Turner Franchise to the effect that it was in perpetuity. More will be said upon this branch of the case under a division of the argument in reference to the question of whether the City has by its

acts estopped itself from disputing the claims of the appellee as to its rights in the City of Des Moines. This question will be taken up as Division VII of the Argument.

In the argument in the lower court much stress was laid by the complainant upon the fact that the ordinance of 1866 was published in the Revised Ordinances of the City of Des Moines of 1900, this being two years after the expiration of the thirty-year period, and it was claimed that this constituted a recognition of the continued existence of this franchise, after 1898, and was therefore a practical construction given it by the City to the effect that it was in perpetuity. The Revision of 1900 was simply a revision or compilation of all of the ordinances of the City of Des Moines, and was not intended as a re-enactment of any of them. An examination of the report of the compiler, Mr. W. H. Baily, found on page 390 of the record, and of the resolution of the City Council approving the revision as submitted by Mr. Baily, found on page 391 of the record, shows that all that was attempted was to compile the ordinances of the City, so that they might be conveniently referred to. The report of Mr. Baily states that "This revision contains all ordinances now in force, as well as those recently passed and approved by the Mayor, with the following exceptions: * * *" This is not a statement, however, that all of the ordinances contained in the Revision are in force, and since the resolution of the council simply approved the Revision, and did not attempt to re-adopt the ordinances contained in the Revision, the inclusion of this ordinance of 1866 was not an admission by the City of Des Moines that it was still in force. The compiler of the Ordinances of 1900 did not attempt to pass upon the validity of the ordinances which were included in the Revision. That was not his province. All he attempted to do was to collect and arrange in order all of the ordinances of the City of Des Moines of importance, whether in force or not, leaving to others to pass upon the question of their validity and whether still in force.

In this Revision were included many ordinances other than the ordinance of 1866 which were not in force in 1900. For instance, there was included on page 390 an ordinancce of the Town of North Des Moines, granting to the North Des Moines Water Company the right to construct, maintain and operate water works in the Town of North Des Moines. This ordinance was without limit and

expired at the time of the consolidation of the Town of North Des Moines with the City of Des Moines.

Blair vs. Chicago, 201 U. S., 400-448;

This ordinance is not printed in the record. There was also included an ordinance of the City of Des Moines, passed in 1891, granting to the Iowa Telephone Company the right to maintain its poles and wires for a period of five years. This ordinance appears as Section 1202 to 1212, inclusive of the Revision of 1900, but is not printed in the record. This grant expired by its terms in 1896, and by no possible construction could be construed as being in effect after that time. The Revision included the ordinance of North Des Moines, granting to the Des Moines Street Railway Company the right to construct and operate its railroads upon the streets of North Des Moines. (Record, p. 429.) This grant was without limit as to time and expired at the time of the incorporation of the town of North Des Moines into the City of Des Moines in 1890.

Blair vs. Chicago, supra.

The incorporation of this ordinance of 1866 was no more a recognition that it was still in force in 1900 than the incorporation of the grant by the Town of North Des Moines to the Des Moines City Railway Company was a recognition that this grant was still in force; or that the grant to the Iowa Telephone Company was still in force. It had been one of the important ordinances of the City of Des Moines; it had been in effect for thirty years, and was properly included as a part of the history of the relations between the Street Railroad Company and the City of Des Moines at the time of the preparation of the Revision of 1900. No one knew what ordinance or franchise the Des Moines City Railway Company was operating under or what the City Railway was claiming for the various franchises of which it was the owner, and it certainly was not the province of the compiler of the ordinances of the City of Des Moines to pass upon this all-important question.

Even if the City Council of the City of Des Moines did by approving the Revision of 1900 intend to recognize this ordinance as still in force, its act could not have the effect of extending the term of the grant beyond 1898, since it was not within the scope of its authority to grant

or renew or extend franchises without the consent and approval of the electors of the city, as has heretofore been pointed out. It is an absurdity to say that while the City Council of the City of Des Moines could not directly grant a new franchise to the Des Moines City Railway Company, or extend the term of any of the grants which the Railway Company held without the approval of the electors, yet it might, by its acts, place a practical construction upon the franchise which would operate to extend the grant beyond the time fixed in the grant itself. This would be permitting the City Council to do indirectly what the law says it shall not do directly. The Street Railroad was a fact in the City of Des Moines; it occupied the streets with its rails, poles and wires, and was operating its cars. It had been in existence some 32 years and it was a very proper thing for the City of Des Moines, in revising its ordinances, to include therein all ordinances under which it might have or did operate during the whole of the period.

V.

FRANCHISES GRANTED BY THE CITY OF DES MOINES OTHER THAN THE ORDINANCE OF 1866.

In addition to the ordinance of December 10th, 1866, the complainant below claims to be the owner of franchises to operate street railways granted by the City of Des Moines to the Des Moines Broad Guage Street Railway Company. (Exhibit No. 32, record page 106; Exhibit No. 57, record page 138.); to the Des Moines River Line Street Railway Company (Exhibit No. 135, record page 261); to the Des Moines Belt Line Railway Company (Exhibit No. 226, record page 243); to the Des Moines & Sevastopol Railway (Exhibit No. 91, record page 202); to the Des Moines Rapid Transit Company (Exhibit 112, record page 225; Exhibit 114, record page 227).

The decree of the Circuit Court expressly recites that the validity of no other ordinance, had or claimed by the complainant, is passed upon, nor are the rights of the complainant, under any other ordinance, determined or adjudicated, and all questions relative to such other ordinances are not determined: this, notwithstanding the fact that the company was claiming, in its complaint, the benefits of all of

the other ordinances referred to in its bill of complaint, and those offered and introduced in evidence. The respondent submits that the complainant has no right or rights under the ordinance of December 10, 1866, neither does it have any right under any other ordinance granted by the city of Des Moines.

1. Des Moines Broad Guage Street Railway Franchise.—Of the franchises above named the grant to the Des Moines Broad Guage Railroad is the only one which is broad enough in its terms to cover the whole city. The ordinance containing the grant to this road (and we need only consider the second ordinance) is Exhibit No. 57, record page 138. This ordinance was passed in 1887, and the grant therein contained was made for the term of 25 years; it therefore will expire in 1912. The authority conveyed was "to construct, maintain and equip and operate for a term of 25 years, upon the conditions hereinafter stated, with electric or other practical motor power, other than animal or steam power, on any street, single or double, standard or broad guage street railway tracks four feet eight and a half inches wide, along and through the streets, alleys, viaducts and bridges of and within the city of Des Moines hereinafter designated; and such other streets and alleys as such company may hereafter select with the consent and approval of said city." (Sec. 1, Ex. No. 57, record page 138.)

Under this grant of authority the Des Moines City Railway Company, the assignee of the Des Moines Broad Guage Street Railway Company might operate on any street in the city of Des Moines, having first obtained the consent of the city council to enter upon the said street. The Des Moines City Railway Company, however, has never operated its road under the terms of this franchise, and by its acts has clearly shown that it had abandoned its right to operate thereunder.

By Sec. 21 of this ordinance (Record, page 144) the Company is required to pay into the city treasury five per cent of its net earnings annually, after the expiration of ten years from the passage of the ordinance. This would require the company to make payments commencing with the year 1898. These payments have never been made. (Testimony of G. B. Hippee, record, page 615.) By Sec-

tions 1 and 3 of this ordinance (Record, pages 139, 140), the Railway Company is required to obtain permission of the city council before laying tracks on streets other than those mentioned in this ordinance. This provision of the franchise has not been complied with. (Testimony of G. B. Hippee, Record, page 615.) A failure to comply with the terms and conditions of a franchise will constitute an abandonment thereof.

Since the consolidation of the street railways of the city of Des Moines in 1889 (Record, page 197), if the Street Railway Company was operating under the terms of the Des Moines Broad Guage franchise, it became necessary for it, before entering upon any streets other than those named in the ordinance itself, to secure permission from the city council, either in the form of a resolution or an ordinance, while if it was operating under the ordinance of 1866 it had the right to enter upon any street without first obtaining such permission, unless such street was within one block of a street already occupied. The record discloses (Testimony of G. B. Hippee, Record, page 615-616), that it has never obtained permission before entering upon any street which it desired to occupy with its tracks. Furthermore, if it was operating under the Broad Guage franchise, it should have been paying into the treasury of the City of Des Moines five per cent of its net earnings each year, commencing with the year 1898, while if it operated under the ordinance of 1866 such payment was not necessary. That there have been net earnings in that period of time is shown by the testimony of G. B. Hippee, (Record page 617) although no payments have been made to the city. (Testimony of G. B. Hippee, record page 615.) The intention of the Des Moines City Railway Company must, of course, be determined from its acts and the fact that it has wholly failed to comply with two very important requirements of the Broad Guage franchise indicates very clearly an intention not to operate thereunder. The fact that it has failed for so long a time to comply with the conditions of the Broad Guage franchise, while not controlling, is at least a strong indication of an intention to abandon. The intention to abandon, coupled with non-user is sufficient to constitute an entire abandonment of all the rights under this franchise. In the case of *Welsh vs. Taylor*, 31 N. E., 896, on page 898, it was said:

"There must be found in the facts and circumstances connected with the non-user an intention on the part of the owner of the easement to give it up, but the intention existing coupled with the non-user will uphold a finding of abandonment."

And in *Harkrader vs. Carroll*, 76 Fed., 474, the court said:

"Abandonment is a matter of intention, and whenever the intention and an actual surrender of the claim are united the abandonment is complete and operates instanter to restore the title to the United States. * * * While lapse of time is not an essential element of abandonment it may be a strong circumstance in connection with others to prove the intention to abandon."

That at the time of the consolidation in 1889 it was the intention of the Des Moines Street Railway Company to operate under the Turner franchise is clearly shown by the fact that in the consolidation resolutions (Exhibit No. 85, page 195; Exhibit No. 86, page 196; Exhibit No. 87, page 197), provision was made for modifications in the existing franchises; the modifications to be of such a nature as would require the Company to so adjust its system of tracks that parallel streets should "not be occupied nearer than two blocks apart," and permitting the company to operate by electricity or other practical motive power. The Des Moines Broad Guage franchise covered both of these propositions; in section one thereof (Record, page 138), it was provided that the company should only occupy such streets other than those named in the ordinance as the city might permit it to occupy, and in section two (Record, page 139), authority was given to use electric or other motive power. If the Company intended to use the Broad Guage franchise, there was no necessity for any changes.

That this intention was carried out was shown by the fact that after the consolidation the only franchise which was modified was the ordinance of 1866. On the 8th day of March, 1890, the City Council of the city of Des Moines enacted Ordinance No. 492, being "An Ordinance amending Ordinance No. 63, entitled, An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, passed December 10th, 1866." (Exhibits No. 101 and 102, Record, page 216.) (The record reads Ordinance No. 53, passed December 10th, 1886; this is evidently a typographical error.) This ordinance amended Section

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two of the ordinance of December 10th, 1866, among others, and provides that section two shall read: "The cars to be used upon the railway tracks constructed under and in pursuance of this ordinance, or acquired by said Company or its assigns, or that hereafter may be constructed or acquired, shall be operated by animal power or by electricity, or other practical motor power." And further along it also provides for reconstructing and laying of tracks on parallel streets, so that they shall not be laid nearer together than two blocks without the consent of the council, expressed in a resolution or ordinance.

No other franchise was changed. The consolidation resolutions therefore, show that it was the intention of the Railway Company and the expectation of the city that the street railway company would not operate under the Broad Guage franchise, and that this intention was carried out is shown by the fact that the franchise of December 10th, 1866, was amended to conform to the provisions of the consolidation resolutions.

The intention to abandon is shown by the acts of the Company and the City at the time of the consolidation. The failure of the Company, thereafter, to comply with the terms of the Broad Guage franchise, and this coupled with the non-user for a period of 16 years at the commencement of this action, 19 years at the present time, is certainly sufficient to constitute a total abandonment and relinquishment of all rights under this ordinance.

Furthermore, a reading of the bill of complaint shows that the complainant below claims to have been operating at least since 1898 under the franchise of 1866, as is shown by the following quotations therefrom: The 4th sub-division of paragraph 32, (record page 14): "Your orator further alleges that it now has, and that its grantors always claimed the right to build, extend and operate its street railways upon such streets in the City of Des Moines as are necessary for the extension and development of its system of street railways. * * *" And in the 7th sub-division of the same paragraph: "That your orator is about to enter upon certain streets within said city for the purpose of laying its tracks thereon in accordance with the terms and provisions hereinbefore set out. * * *" In other words the complainant below claimed the right to enter upon such streets as it saw fit

to use, regardless of whether or not it had the consent of the city council, and the only ordinance which granted such a right is the ordinance of 1866. In paragraph 31 of the Bill of Complaint (Record, page 13), the complainant below says: "That the said City of Des Moines has, by a long series of acts and enactments, during a long series of years, uniformly treated the said ordinance as a contract, as above set out, and has, by the enactment of many ordinances and resolutions since the year 1890 uniformly recognized the said ordinance of December 10th, 1866, as a contract and interpreted it as hereinbefore set out." In other words, the complainant below insists that all of the resolutions and ordinances which have been passed and enacted by the City Council of the City of Des Moines in reference to street railway matters since the consolidation, have been passed and enacted with reference to the ordinance of 1866, and that all of these enactments, including those passed since 1898, recognize the ordinance of 1866 as a contract. If they did, it must be because the railway company was operating thereunder, since, in not a single ordinance or resolution passed or enacted since the enactment of the amendment to the ordinance of 1866, above referred to, and which was passed on the 9th day of March, 1890, is there any reference in terms to the ordinance of 1866. Since the complainant below claims that all of these enactments recognize the ordinance of 1866 as a valid and existing franchise, it must be that it claimed to be and was operating thereunder, and it must, therefore, have abandoned the Broad Guage franchises and all other franchises. No other theory is consistent with the contention of the complainant below. The claim that the resolutions and ordinances of the council recognize the ordinance of 1866 as a contract, without any direct reference in such resolutions and ordinances thereto, can only be made upon the ground that the Des Moines City Railway Company was claiming the right to operate thereunder. The Railway Company, by its own declaration, shows that it had abandoned the Des Moines Broad Guage franchise, and it can, therefore, claim no rights thereunder.

2. The Des Moines River Line Street Railway Franchise. (Exhibit 135, Record, page 261.) The ordinance granting to the Des Moines River Line Street Railway Company the right to construct its railway, was passed Sept. 20th, 1888, and seems to be without

term. Because of the fact that it is without term, and the city had no authority to grant a franchise in perpetuity, as we have shown in Division Three of this Argument, this grant was absolutely void. Moreover, it only grants the right to construct upon three streets, and for an extremely short distance upon each of these streets, the total length of road authorized being five blocks. This franchise only authorizes the grantee to propel its cars by steam, applied by what is known as a cable system, or what is known as a noiseless steam motor. (Sec. 2, Exhibit 135, Record page 261.) The Des Moines City Railway propels its cars by electricity supplied from an overhead wire. (Testimony of G. B. Hippee, Record, page 541), and it follows therefore, that it has never made use of this franchise, and never will.

Furthermore, in Section 21 of the ordinance (Record, page 266), there is a requirement that after ten years from the date of the passage of the ordinance, which was passed September 20, 1888, the grantee was to pay to the city five per cent of its net earnings. This payment has never been made. (Testimony of G. B. Hippee, Record, page 615.) This franchise has, therefore, been abandoned and the appellee can claim no right thereunder.

In Sec. 12 of this grant (Record, page 264), there is a provision for a forfeiture if the company shall fail to use any of the track or tracks constructed thereunder and run cars thereon for a period of thirty days, and authorizing the City Council by resolution to declare the streets or parts of streets not used abandoned, and requiring the company to remove their tracks. The resolution of the council of November 21, 1905, so far as this franchise is concerned, should be treated as a declaration of such abandonment, since the Company has failed to operate under the provisions of the ordinance.

3. Des Moines Belt Line Railway Company Franchise. (Exhibit No. 126, Record, page 243; Exhibit 130, Record, page 247). This franchise was granted on the 16th day of May, 1888, and seems to be without term. Since the grant is without term and the City of Des Moines had no power to grant a perpetual franchise, as has been shown in Division Three of this Argument, this franchise is absolutely void. It covers but a few blocks in the City of Des Moines and is of

no practical value to the appellee. Moreover, it authorizes the company to use as a motive power only steam or electric motor. (Sec. 5, Exhibit No. 126, Record, page 244.) The Des Moines City Railway Company does not use either steam or electric motor as a motive power, and never has, and never will, and therefore has abandoned this franchise and can claim no rights thereunder.

4. The Des Moines & Sevastopol Railway Franchise. (Exhibit 91, Record page 202.) This franchise was granted on the 10th day of November, 1883, and was for a term of thirty years; it therefore expires in 1913. It covers the streets in but a small portion of the City of Des Moines. (Sec. 1, Exhibit No. 91, Record, page 202.) Moreover, that ordinance authorizes the company to propel its cars by animal power only. The appellee has not used animal power for propelling its cars, and has abandoned this franchise by a failure to comply with its terms.

5. The Des Moines Rapid Transit Company Franchises. (Exhibits 112, 114, Record, page 225, 227 and 231.) The grants to the Des Moines Rapid Transit Company were made on May 14, 1888, and August 21, 1888, and no term was named. The franchise being without term, and the City of Des Moines having no power to grant a perpetual franchise, as has been shown in Division Three of this Argument, these ordinances are void. The ordinances cover but two streets in the city, these being Grand Avenue from Fifth Street west to a point between 17th and 19th Streets, and Ingersoll Avenue from 19th Street west to the old city limits.

The grant in both ordinances is to the Des Moines Rapid Transit Company, without words of succession or assignment. (Sec. 1, Exhibit 113, Record, page 225; Sec. 1., Ex. 114, Record, page 227.) Since a franchise which contains no words of succession or assignment cannot be sold or transferred, the appellee can claim no rights under these ordinances.

In *Thomas vs. Railway Company*, 101 U. S., 71, in which was involved the question of the right of the grantees of a railroad franchise to release and surrender control over its franchise to an assignee, so that it was left in the hands of the assignee to carry out and

perform the public function required in the franchise, the court held the assignment void, and said on page 83:

"The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions and which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

And on page 84, the Court quotes with approval from the case of *Black vs. Canal Company*, 7 C. E. Green, 130, 22 N. J. Equity, 130, the following language:

"It may be considered as settled that a corporation cannot lease or alienate any franchise or any property necessary to perform its obligations and duties to the state without legislative authority."

In the case of *Penn Ry. Co. vs. St. Louis Ry. Co.*, 118 U. S., 290, the court, after a review of the cases, says, on page 309:

"We think it may be stated as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers. * * *"

In the case of the *Oregon Railway & Navigation Company vs. Oregon Ry. Co.*, 130 U. S., page 1, the same doctrine is announced.

It follows, therefore, from the principle laid down in these cases, that the Des Moines Rapid Transit Company had no power to transfer the franchises granted to it by the City of Des Moines, for these franchises contained no words authorizing the sale or transfer, and the rights granted must, therefore, be considered as granted to the Des Moines Rapid Transit Company only, and in the expectation and with the intention that they should be exercised only by this company. The Des Moines City Railway Company can, therefore, claim no rights under the franchises granted to the Des Moines Rapid Transit Company.

VI.

THE COMPLAINANT HAS NO RIGHT OR RIGHTS UNDER THE ORDINANCES ENACTED BY THE SUBURBAN TOWNS WHICH WERE ANNEXED TO DES MOINES IN 1890.

In 1890 there were annexed to the City of Des Moines, and included and incorporated therein, a number of independent municipalities lying contiguous to the City of Des Moines. Prior to this annexation some of these municipalities had granted franchises to various street railway companies, each and all of which franchises the appellee claims now to own, and is asserting some rights thereunder. The franchises which were granted by these various municipalities were as follows:

Town of North Des Moines to the Des Moines Street Railway Company, granted May 9, 1885. (Exhibit 19, Record, page 87.)

Town of North Des Moines to the Des Moines Broad Guage Street Railway Company, granted July 6th, 1886. (Exhibit 32, Record, page 106.)

Town of North Des Moines to the Des Moines Electric Railway Company, successor to Des Moines Broad Guage Railway Company, granted August 8th, 1888 (Exhibit 69, Record, page 181.)

Town of North Des Moines to the Des Moines Electric Railway Company, granted February 28, 1889. (Exhibit 77, Record, page 189.)

Town of North Des Moines to the Des Moines Electric Railway Company, granted April 4, 1889. (Exhibit 79, Record, page 190.)

Town of North Des Moines to the Des Moines Belt Line Railway Company, granted February 28, 1889. (Exhibit 132, Record, page 250.)

Town of North Des Moines to the Des Moines Belt Line Railway Company, granted February 7, 1890. (Exhibit 133, Record, page 252.)

Town of North Des Moines to the Des Moines Street Railroad Company, granted November 13, 1888. (Exhibit 75, Record, page 188.)

Town of Capital Park to the Des Moines Street Railroad Company, granted June 1st, 1887. (Exhibit 146, Record, page 282.)

Town of Capital Park to the Des Moines Broad Guage Street Railway Company, granted April 19, 1887. (Exhibit 145, Record, page 278.)

Town of University Place to the Des Moines Electric Railway Company, granted April 1, 1889. (Exhibit 148, Record, page 288.)

Town of Sevastopol to the Des Moines & Sevastopol Railway Company, granted August 10th, 1885. (Exhibit 93, Record, page 205.)

Town of Grant Park to B. F. Elbert et al., granted October 12, 1888. (Exhibit 143, Record, page 275.)

Town of Greenwood Park to the Des Moines Rapid Transit Company, granted September 28, 1888. Exhibit 115, Record, page 231.)

Of these franchises some were without term, some contained no words of assignability or succession; others provided for motive power other than electricity supplied from an overhead wire; some were applicable to particular streets which have never been occupied, and others contained conditions which have never been complied with; and therefore, the appellee can claim no rights under any of them.

1. Franchises Without Term.—Of the franchises granted by the municipalities which were incorporated into the City of Des Moines in 1890, enumerated above, the following had no term fixed therein for the duration of the grant:

Town of North Des Moines to the Des Moines Street Railway Company, (Exhibit 19, Record, page 87);

Town of North Des Moines to Des Moines Street Railroad Company, (Exhibit 75, Record, page 188);

Town of North Des Moines to the Des Moines Electric Railway Company, granted February 18, 1889, (Exhibit 77, Record, page 189);

Town of Grant Park to B. F. Elbert et al., (Exhibit 143, Record, page 275);

Town of Greenwood Park to Des Moines Rapid Transit Company, (Exhibit 115, Record, page 231).

As has been shown in Division Three of this Argument these municipalities had no power to grant franchises in perpetuity; it follows,

therefore, that these five grants were void for want of authority in the municipality.

But if this were not true, yet, by the incorporation of these smaller municipalities into the City of Des Moines, these grants were terminated.

In the case of the *People vs. Chicago Telephone Co.*, 77 N. E., 245, there was involved the right of the Telephone Company to continue to operate under franchises granted by incorporated towns immediately adjacent to the city after these towns had been incorporated into the City of Chicago. The franchises granted by the towns did not fix the rates to be charged for the service, while the ordinances of the City of Chicago fixed the maximum rate to be charged. The Telephone Company claimed the right to charge in the territory covered by the ordinances of the towns such amount as they deemed best, while the City of Chicago claimed that it could only charge the rate fixed in the Chicago ordinances, and upon this question the court said:

"The ground of defendant's claim that the ordinance does not limit its charges in the annexed territory, is that before the annexation the minor municipalities had granted to it the right to occupy the streets therein for its business without any limit as to the time. If the grants had been for terms of years under legislative authority authorizing them, and the terms had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city because they had become binding contracts under which the defendant had vested contract rights for such term. But they were of no definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service, to the town or village hall, or the village authorities free, or for some reduced rate. Such grants cannot be construed to be perpetual, and at most cannot extend beyond the lives of the corporations granting them. Upon the annexation there ceased to be any town or village authorities."

In the case of *Blair vs. Chicago*, 201 U. S., 400, 488, 50 L. Ed., 801, this court had occasion to pass upon the validity of a franchise granted to a street railway company by the town of Lake View, the territory therein having been annexed to the City of Chicago in 1889. The grant was without limit as to time, and upon this question this court said, on page 488 of the opinion:

"We think in such case that the terms granted would not extend

beyond the life of the corporation conferring them, where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity."

This court then quoted with approval the language above quoted from the case of *People vs. Chicago Telephone Co.*, 77 N. E., 245, and in reference thereto says:

"This seems to us a reasonable view, and being the construction of the highest court of the state of Illinois we are willing to accept it."

Under the rule laid down in these cases, whatever may be said with reference to the franchises granted by the suburban towns around the City of Des Moines, which were for a fixed and definite term, all rights under the five franchises above listed terminated at the time of the annexation.

2. Franchises Containing No Words of Assignability or Succession.—Four of the franchises granted by the suburban towns, which were afterward incorporated into the City of Des Moines, contained no words of succession or assignability. These are the franchises granted by the town of North Des Moines to the Des Moines Street Railroad Company (Exhibit 75, Record 188); Town of North Des Moines to Des Moines Belt Line Railway Company (Exhibit 133, Record, page 252); Town of Greenwood Park to Des Moines Rapid Transit Company (Exhibit 115, Record, page 231); Town of Grant Park to B. F. Elbert et al., (Exhibit 143, Record, page 275). These franchises could not be sold, assigned or transferred to any other company, as has been shown in a previous division of this argument, and therefore, the Des Moines City Railway Company can claim no rights thereunder.

3. The franchise granted by the Town of North Des Moines to the Des Moines Broad Guage Street Railway Company, under date of July 6, 1886 (Exhibit 32, Record, page 106), which was amended by the ordinance of August 8, 1888, (shown as Exhibit No. 69, Record, page 181), was for twenty-five years, and expires July 6, 1911. This franchise has been abandoned by the Street Railway Company as is shown by the fact that the ordinance requires that except upon those streets which are named in the ordinance the Railway Company shall obtain the permission of the Council before laying its tracks

thereon. This permission has never been obtained (testimony of G. B. Hippee, Record, page 616).

4. The franchise granted by the Town of North Des Moines to the Des Moines Electric Railway Company, successor to the Des Moines Broad Guage Street Railway Company, April 4, 1889, (shown as Exhibit 78, Record, page 190), grants to this company the right to construct a railway on North Street, now University Avenue, from Seventeenth Street to the west corporate limits of the town. This piece of track was never constructed during the existence of the Town of North Des Moines, and, in fact, was not constructed until 1903. (Testimony of G. B. Hippee, Record, page 16). At the time of its construction, it could not have been constructed under either of these ordinances, because the Town of North Des Moines had ceased to exist, and the company having acquired no rights thereunder prior to the time the corporation making the grant had gone out of existence was hardly in a position to claim rights thereunder fourteen years after the grant. At any rate, this franchise covers but a few blocks on one street, and is of no practical value.

5. The franchise granted by the Town of North Des Moines to the Des Moines Belt Line Railway Company under date of February 28, 1889, (Exhibit 132, Record, page 250), grants the right to construct on State Street from Main Street west to the corporate limits. This track has not been constructed to this day, (See Map Exhibit "F," Record, 678), and this franchise must be considered as abandoned, since in Section 3 of the ordinance (Record, page 251), there is a requirement that the track be constructed within six months on a portion of the line, and within eighteen months on the balance, and a further provision for a forfeiture if these conditions are not complied with. The resolution of the City Council of the City of Des Moines, November 21, 1905, forfeited this right if it had not been lost sooner. A failure to occupy a street for a period of nineteen years from the time the authority to occupy it is granted by the franchise certainly indicates an intention to abandon and an actual abandonment of all rights under the franchise.

6. The franchise granted by the Town of Capital Park, under date of April 19, 1887, (Exhibit 145, Record, page 278), was for a

term of twenty-five years, and expires in 1912. This franchise covers specific streets, and, as is shown by the plat, Exhibit B, attached to the Record, none of the streets included in the ordinance were ever occupied, except Ninth Street, from the corporation line north to Washington Avenue. The failure of the Company to construct upon the balance of the streets, even to this day, as shown by Plat Exhibit F attached to the record, certainly indicates an abandonment of this franchise, as least as to all streets except Ninth Street. In section 10 of the ordinance there is a provision for a forfeiture, and the resolution of the City Council of the City of Des Moines of November 21, 1905, is a declaration of such forfeiture, if the right to occupy such streets had not been abandoned long before that.

7. The franchise granted by the town of Capital Park to the Des Moines Broad Guage Street Railway, under date of April 19, 1887, was for a period of twenty-five years, and expires in 1912. (Exhibit 145, Record, page 278). This franchise covers specific streets in the Town of Capital Park, none of which have ever been occupied to this day, as is shown by the maps, Exhibits A, B, C, D, E and F attached to the record. Certainly a failure to construct for a period of twenty-one years after the date of the grant is an abandonment of all rights under the grant.

8. The franchise granted by the Town of University Place to the Des Moines Electric Railway Company, under date of April 1, 1889, (Exhibit 148, Record, page 288), was for a period of twenty-five years and expires in 1914. This franchise covers but nine blocks and is of no practical value to the Des Moines City Railway Company. It has never operated thereunder, but has used the tracks on these streets in connection with its tracks on other streets which were operated under the ordinance of 1886.

9. The franchise granted by the Town of Sevastopol to the Des Moines & Sevastopol Railway, under date of August 10, 1885, (Exhibit 9, Record, page 205), was for a period of thirty-five years and expires in 1920. This franchise authorizes the use of animal power only (Sec 2, Exhibit 93, Record, page 206). The Des Moines City Railway Company is not operating by animal power but is using electricity supplied from an overhead wire in the operation of its cars. It

is not, therefore, operating under this franchise and has not been for a period of at least seventeen years, which certainly constitutes an abandonment of the grant.

10. We see no good reason why the rule laid down in the case of *Blair vs. City of Chicago*, 201, U. S. 400-467, that a franchise to a street railway company which is without term expires with the life of the corporation making the grant should not apply to these franchises which have a fixed and definite term. The same reasoning will apply in both cases. Under the grants for a fixed term, the public service corporation assumed certain duties to the public of the town making the grant, and with the expiration of the life of the corporation making the grant there was no one left for whose benefit these duties could be performed. A public service corporation accepting a grant takes it knowing that the life of the municipality may be ended at any time and therefore assumes this risk when it accepts the grant. The rule laid down in the case of *Blair vs. City of Chicago* and in the case of *People vs. Chicago Telephone Company*, should be extended to include those franchises which are granted for a fixed term.

VII.

The Appellant is not Estopped from Questioning the Right of the Appellee to Occupy its Streets.

The complainant below, in its bill, while not specifically claiming an estoppel, yet inferentially seems to rely upon one, claiming that the city having permitted it to make expenditures and extend its tracks since 1898, and having recognized its existence by resolutions and ordinances passed by the City Council, is now estopped from claiming that it has no rights in the streets.

To be available, matters in estoppel must be especially pleaded. As was said in *Golden vs. Hardesty*, 93 Iowa, 622-627:

"It is a well settled rule in this state that matters in estoppel to be available as such must be especially pleaded."

In support of this doctrine many Iowa cases are cited. This rule is so universal that it seems to be unnecessary to quote further from the authorities, and we submit that the appellee, the complainant in

this case, does not plead specifically an estoppel, and that therefore the appellee is not in a position to rely thereon.

But however that may be, a street railway, which is in possession of a street after the expiration of its franchise is a mere trespasser, and the fact that it has made expenditures since the expiration of its franchise and that the value of its property will be affected by a forfeiture of its rights can not estop the municipality from questioning its rights in the streets.

Neither can expenditures in improvements after the expiration of the franchise operate as a renewal thereof. In the case of *Cedar Rapids Water Company vs. Cedar Rapids*, 118 Iowa, 234, in which was involved the rights of the water company in the streets of Cedar Rapids after the expiration of its franchise, it was said, on page 254:

"The claim of actual possession and use of the franchise by the plaintiff does not, as we view it, add to the strength of its position. * * It is true that at the time this action was begun the plaintiff had been furnishing the City of Cedar Rapids and its people with water for twenty-five years, but such service had been rendered under a contract which, as we have held, was limited to that period, and the money and labor expended in constructing, maintaining and operating the works must be held to have been expended with reference to the term for which it held a valid grant. Neither can there be any such acquiescence or waiver by the City as will prevent or estop it from denying the validity of an act beyond the scope of its municipal powers. * * * Nor do we see how the failure of the state to institute *quo warranto* proceedings affects the rights of the parties under the circumstances. To apply the language above quoted from Judge Cooley, 'a waiver by the state cannot have the effect to revive an estate which has expired by limitation,' and especially a limitation which inheres in the grant by virtue of the statute, from which alone the power to make the grant is derived. * * * It is said that to hold the franchise to have expired and put it in the power of the city to terminate the privilege enjoyed by the plaintiff is to destroy the value of plaintiff's property and thus perpetrate upon it a great injury. * * * But assuming that it does result in a loss, such is the frequent event attending business enterprises. Plaintiff entered into a contract having a definite limit and with knowledge of the city's lawful right to insist that the limit be observed, and if by any mistake of judgment on its own part, or by the exercise of any lawful power on the part of the city the enterprise has proved unprofitable, it is not a ground for relief at the hands of the court. The fact that the exercise of a lawful power may affect the value of plaintiff's property is also in itself immaterial."

In the case of *Grand Rapids Bridge Company vs. Prang*, 35 Mich., 400, the plaintiff had been granted a right to locate a bridge and take tolls for a period of twenty years. The term expired and the plaintiff having continued to take tolls without objection from the state, from which it derived its corporate existence, or the Board of Supervisors from which it received the franchise to take tolls, claimed the right to take tolls for the balance of its corporate life. The right was denied, the court saying, on page 405:

"In this case there is no question of forfeiture, but there is a question of the continued existence of the franchise to take tolls. The estate in it was expressly limited to twenty years and when that period came to an end the estate ceased also. There was no longer color of law for taking tolls, and the failure of the state to institute proceedings could no more continue the franchise or restore it to life than the like failure in the case of one who should erect a gate across a common highway and levy tolls. When the twenty years expired, the defendant had a right to refuse to pay any longer, and every person had the like right. If all others acquiesced their action could not bind the one who refused."

The case of the *Cincinnati Inclined Plane Co. vs. The City of Cincinnati*, 44 N. E., 327, is very much like the case at bar. The City of Cincinnati had granted to the Cincinnati Inclined Plane Company the right to operate their line of railway upon certain streets. The grants, by their terms expiring in 1884 and in 1885, the Railway Company was given permission by the Board of Public Works, as required by the Ohio statutes, to use other motive power than animal. The statutes also provide that renewals of grants in streets may be made by the action of the Board of Public Works and the City Council. The Railway Company continued to operate, and expenditures were made in improvements and extensions. It was contended by the Railway Company that such acquiescence and the action of the Board of Public Works in allowing the change of motive power amounted to an implied renewal of the grants to use the streets, and the city ought to be estopped to deny it. Upon this question the court said, on page 249:

"But it may be said that the expenditures which the defendant incurred in substituting electricity as a motive power estops the city from claiming there was not a renewal, and therefore there is a renewal by estoppel. It is a sufficient answer to this claim to say that these expenditures were not authorized by both boards in whom was vested jurisdiction to make renewals. But if they had been so authorized,

what amount of expenditure should a court hold was necessary to constitute a renewal and how are we to determine from the amount of expenditures the time for which such renewal was made, for one year or for twenty-five years? And suppose a street railway had no grant in the beginning, what amount of expenditure would be sufficient to give them an implied grant?"

The court held that the city was not estopped, and held that the grants expired in 1884, and that thereafter the plaintiff was a mere trespasser upon the streets of the city.

Since the enactment of the Code of 1897, to extend or renew the franchise of a street railway company operating by means of electricity supplied by means of an overhead wire in any municipality in Iowa requires the concurrent action of the city council and the electors of such city.

Section 775 of the Code of 1897 of Iowa, provides that "cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof * * *" and Section 776 provides that "No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places for any of the purposes named in the preceding section unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election." The Des Moines City Railway Company operates its cars by means of electricity supplied from an overhead wire, and no act of the city council could renew or extend the franchise of such railway company without the consent of the electors. No such consent has been granted or given.

When the concurrent action of two bodies is required in granting a franchise, the grant of the one without the concurrence of the other, even though expenditures are made in reliance thereon, is ineffective. As was said in the case of the *Cincinnati Inclined Plane Company vs. City of Cincinnati*, supra, on page 333:

"Did these resolutions of the board of public works and board of public affairs, and the expenditures made by the defendant company by virtue of them, impliedly renew this grant as of route No. 8, or give vitality to the void grants of 1871 and 1875? Our statutes in force in 1885 and 1888 provided for the renewal of grants for street railroads and defined the limits of time of such renewals. They also

provided that no renewal should be made except by the concurrent action of the board of public works and the city council. Now, whether in view of these express statutory provisions it is possible under the laws of Ohio to have an implied renewal of the street railroad grant without some express action of these boards it is not necessary for us to determine at this time. *Booth St. Ry. Law*, Sec. 43. But conceding that there may be such an implied renewal, it can only arise from the acts of those officials who have the power to make the renewal: and where, as in this case, only one of the boards authorized to make the renewal acted in the matter, it necessarily follows that there can be no renewal of such grant."

It is elemental that to constitute an estoppel or waiver on the part of a municipal corporation, the acts relied upon as constituting such estoppel or waiver must be the acts of officers acting within the scope of their authority and power.

In the case of *Seager vs. Mueller* (Ill.) 24 N. E., 513, it is said on page 514:

"No estoppel can ordinarily arise from the act of a corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore, cannot be deemed to have been deceived or misled by acts done without legal authority."

The case of *Driscoll vs. New Haven* (Conn.), 52 At., 618, 19-20, was a case in which the common council of New Haven had entered into a contract with plaintiff in regard to the sale of land, which the court found was not within the powers of the council to make. It was contended that the city council had received consideration for the contract and were equitably bound to perform their part. Upon this the court said:

"The court of common council of the defendant city has never voted to sell or convey or authorized the sale or conveyance of the land in question. No other officer or board has the power to do so. The contention of these moving defendants against the city must, therefore, arise upon equitable consideration alone. There must appear to have been some agrement, inducement or conduct on the city's part which has reasonably influenced its said co-defendants to action which would work to their injury if the city is not now compelled to do what it had thus allowed them to believe it would do. This agreement, inducement or conduct must have been that of representatives of the city authorized to bind it in the matter in question, or an agreement, inducement or conduct by others so confirmed or ratified by these proper representatives as to have become binding upon the city as

the act of these representatives. Unauthorized agents or representatives can of themselves alone no more bind equitably than they can legally. * * * The defendant Beechan, when he negotiated with the board or its president, was bound to know the limitations upon their powers. He was bound to know that the court of common council of the city could make a binding agreement with him of the character of that alleged to have been made; he had no right to rely upon any agreement made by other city officers, and can therefore base no equity, enforcable in the courts, upon such an agreement."

In the case of *State vs. Minnesota Transfer Railway Company*, 83 N. W., 32, on the question of estoppel, the court said, on page 35:

"And of course it is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril inquire into the power of the corporation and its officers to make the contract. * * * Estoppel in this case or in any other where a plain duty rests upon the party cannot be predicated upon the compromise of some difference of opinion as to exactly what the performance of that duty requires."

In the case of *Wormstead vs. Lynn* (Mass.) 68 N. E., 841-42-43, referring to a plea of estoppel, the court said:

"For the decisive answer to the whole contention is that the doctrine relied on by him has no application where a person enters into a contract with a public officer who undertakes to act for and to bind a municipal corporation or other body politic. Such a person is bound, at his peril, to ascertain the extent of the authority of the public officer with whom he is dealing. In such a case the money pledged for the payment of the contractor is the money of the public, or of an ascertained portion of the public, and the public is not estopped by violation of duty on the part of public officials, no matter how many officials may have been concerned in it, and no matter how long it may have continued."

In the case of *Marsh vs. Fulton County*, 10 Wall., 676, bonds had been issued by the defendant county in payment of a subscription to a railroad company, without the proposition having first been submitted to the legal voters of the county, as required by the statute of Illinois. On one occasion interest had been paid by the county on these bonds, two of the bonds had been paid, and in numerous ways, as the plaintiff claimed, the liability of the county had been recognized. These facts together with the fact that the bonds were in the hands of innocent holders were contended by the plaintiff to constitute an estoppel against the county to plead the illegality of the original issue. The court

held, however, that the county could not be thus estopped, and on page 684 said:

"A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that the ratification can only be made when the party ratifying possesses the power to perform the act ratified. * * * It would be absurd to say that they could, without such vote, by simple expression of approval, or in some other indirect way, give validity to the acts, when they were directly in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition."

And again, the court says:

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains money or property of others without authority, the law, independently of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way when the statute declares that it shall only be created in another and different way."

In the case of *Lancaster vs. Miller*, (Ohio) 51 N. E., 54 referring to a plea of estoppel based upon the acts of certain public officers, the court says:

"Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which statutes impose. A corporation should not be estopped by the acts of its officers to set up these statutes in defense of contract made in disregard of them. It would be idle to enact these statutes and afterwards permit their practical abrogation by neglect or misconduct of the officers of the municipality."

The legislature of Iowa, when it enacted Section 775 and 776 of the Code of 1897, limited the power of city councils in reference to the granting, renewing and extending of franchises of the kind in question in this suit. It therein prescribed the steps which must be taken to secure or to renew or extend such a franchise, and to hold that the acts of the city council or other officers of the City of Des Moines since the expiration of the franchise of 1866, could operate as a renewal of such franchise or as an extension thereof, would be to abrogate the provisions of these two sections. A franchise to construct a street railway operated by electricity supplied from an overhead wire on the streets

of any municipality in Iowa, or the renewal or extension of such a franchise, can be obtained only with the approval of the electors of such municipality.

What has been said with reference to estoppel and waiver, is applicable to the claim that the city, by its acts, has placed an interpretation upon the ordinance of 1866 to the effect that it is perpetual. If it is beyond the power of the city council or the city officers to renew or extend this franchise, without a vote of the people, it certainly is beyond their power to place an interpretation upon a contract which will be binding upon the city. It is a peculiar condition that the Street Railway Company should claim that everything which the city has done in reference to street railway matters has been a recognition of the perpetuity of the grant of 1866, while at the same time they are claiming that they have other franchises under which they are entitled to operate. Why is it that none of the acts of the city and its officers bear no relation to the other franchises and have not been in recognition of them?

The acts which the appellee is relying upon as constituting the recognition of the existence as a valid contract of the ordinance of 1866, and as estopping the city from questioning its rights in the streets, and as having placed an interpretation upon the contract to the effect that it is perpetual, consist of various resolutions and ordinances passed by the city council of the city of Des Moines, the requirement that it pay its part of the cost of paving the streets upon which its tracks are constructed, and the requirement that it pay to the owners of abutting property a portion of the value of paving on streets already paved, upon which it desired to lay its tracks. The resolutions referred to nearly all relate to paving matters, as will be seen from an inspection of the record. None of them, in terms, refer to any franchise or ordinance in particular. The ordinances referred to are in general regulating ordinances, applicable to all street railways, with the exception of one or two, which grant rights to the Des Moines City Railway Company, with reference to the carrying of freight or mail. None of these ordinances refer to any franchise in particular, unless it may be the ordinance passed on the 4th day of February, 1895, which was an ordinance authorizing the Des Moines City Railway Company to use its railway tracks and cars

for carrying United States mail, express and freight, and for carrying materials for the construction and operation of its road. (Exhibit 151, record page 292.) This ordinance contained the following provision, in Section 8. (Record, page 294):

"Nothing in this ordinance contained shall be so construed as to extend the charters of any of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charters, and if the charters of any of the said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time."

The grant contained in the ordinance was for a period of eight years. The only franchise which, under any possible construction could have expired within eight years, was the franchise granted September 10th, 1866, and which the company is now claiming the city has recognized as perpetual. This franchise, under the construction contended for by the appellant, expired January 1st, 1898, and Section 8 of the ordinance of February 4, 1895, could have referred to no other ordinance. It would seem, therefore, that the city council of the city of Des Moines, instead of recognizing that the ordinance of 1866 granted a perpetual right, expressly declared in the ordinance of 1895 that it was their opinion that it might expire within eight years from 1895, which expressly negatives the claim of the appellee that the city has always recognized the Turner franchise as a valid and existing contract, perpetual in terms. The reference in Section 8 of this ordinance of 1895 could not have been more explicit if it had referred to the ordinance of 1866 by its title, since all of the other franchises granted, both by the city of Des Moines and the suburban towns adjacent thereto, were granted between the years 1885 and 1890, and none of them were granted for a period shorter than 25 years, so that by no possible construction could the term of any of them expire within eight years from 1895, while the franchise of 1866 would expire, under the construction claimed by the appellant, within three years.

So far as the paving is concerned and the requirement by the city of Des Moines that the company pay a portion of the cost of paving streets, and pay to the property owners a portion of the value of the paving upon the streets upon which it should enter which were already

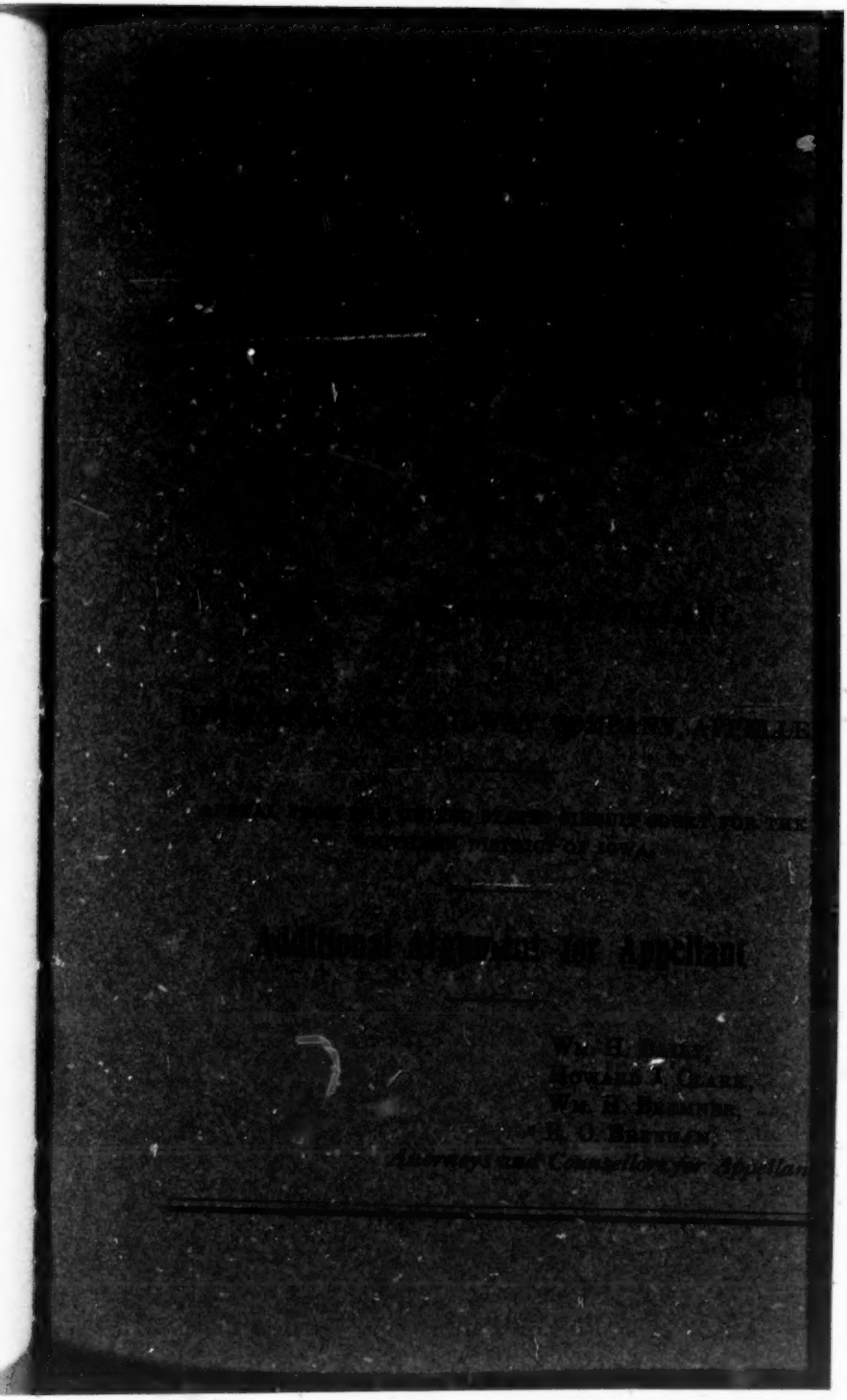
paved, this was a matter concerning which the council had no option. The Street Railway Company was a fact. It was operating in the city of Des Moines and was occupying the streets of the city with its tracks. *Section 831 of the Code of Iowa* provides:

"All railway and street railway companies shall be required to make, reconstruct and repair all paving, graveling or macadamizing between the rails of their tracks, and one foot outside thereof, at their own expense, unless by ordinance of the city, or by virtue of the provisions or conditions of any ordinance of the city under which said railway or street railway may have been constructed or may be maintained it may be bound to pave, gravel, or macadamize other portions of said street * * *."

And it is provided by *Section 835 of the Code of 1897* that "Before any street railway company shall lay its tracks upon any street that has been paved, and which at the time is not being re-paved, it shall pay into the city treasury the value of all paving between its tracks and one foot outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street, in proportion to the amounts originally assessed against the property abutting thereon."

It was the legislature of Iowa that compelled the street railway company to pay for paving. The city council of the city of Des Moines simply carried out the provisions of the statute, and attention is called to the fact that the city has always insisted that the street railway company was required to pave between the rails and one foot outside thereof on all streets which were being newly paved, while the provisions of the ordinance of 1866 is to the effect that it was only to be required to pay for the paving between the rails. (Sec. 4, Exhibit A, record page 19.) It is true that the city contended that even if the ordinance of 1866 was in force, that none-the-less the street railway company was required to pay for the paving between the rails and one foot outside thereof because of the wording of the statute, but there was no recognition of the validity of the ordinance of 1866, or of any other ordinance as a contract valid and existing, in requiring the street railway company to pay for paving. This was a matter which was required by the state legislature. The railway company was actually occupying streets, and whether occupying them with or without authority of the city of Des Moines, the statutes of the state required that it pay for the paving. The city officers of the city of Des Moines

have never directly or indirectly placed the construction upon the ordinance of 1866 contended for by the appellee. Everything that they have done is just as consistent with the recognition of the existence of other franchises as the existence as a valid contract of the ordinance of 1866. As a matter of fact none of the acts of the city recognized any of the franchises claimed by the Des Moines City Railway Company as valid and existing contracts. The city council and other officers of the city simply treated the street railway company as an existing fact and dealt with it accordingly.

For the reasons pointed out, we respectfully submit that this cause should be reversed.

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